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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 197 and 201

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC & GAS COMPANY, UNITED GAS IMPROVEMENT COMPANY and PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

BEL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, LOUISIANA LAND AND EXPLORATION COMPANY, MORRIS RAUCH ET AL. and SUN OIL COMPANY,

Respondents.

CROSS-PETITION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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Nos. 197 and 201

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC & GAS COMPANY, UNITED GAS IMPROVEMENT COMPANY and PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

BEL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, LOUISIANA LAND AND EXPLORATION COMPANY, MORRIS RAUCH ET AL. and SUN OIL COMPANY,

Respondents.

CROSS-PETITION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review four judgments of the United States Court of Appeals for the Fifth Circuit, dated April 23, 1958, remanding previously dismissed rate proceedings to the Federal Power Commission for the receipt of additional evidence. Sun[1] has petitioned this Court for a writ of certiorari

[1] The appeal of Sun from the FPC determination, together with appeals by Sohio Petroleum Company, Maracaibo Oil Exploration Corporation and E. J. Hudson, et al., was heard on a single, consolidated record, which will be referred to as SR . The appeals of the members of the Union group (consisting of Union, Louisiana Land, Rauch and Bel) were also heard on a single, consolidated record, which will be referred to as R .

(October Term, 1958, No. 167) to review one of said judgments. The questions presented by the instant cross-petition (and petition) are not presented by Sun.

Citations to Opinions Below

The opinions of the FPC dismissing the proceedings (R3053-3073; SR9380-9392) are reported at 16 F.P.C. 100 and 16 PUR (3d) 112 (Union) and 17 F.P.C. 174, and 18 PUR (3d) 465 (Sun). The opinions of the FPC denying rehearings (R3167-3176; SR9593-9596) are reported at 17 PUR (3d) 291 (Union) and 17 F.P.C. 501 (Sun). The opinions of the Court of Appeals are unreported. All of the foregoing opinions are printed in Appendix A hereto, *infra*, pp. 1a-80a.

Jurisdiction

The judgments of the Court of Appeals were made April 23, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Did the Court below err in reopening proceedings on the appeals by Sun, Bel and Rauch in view of their failure to seek statutory leave of the Court below to adduce additional evidence, the exclusive remedy available to them upon the FPC's refusal to receive this evidence, under the holding in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, which has been followed by five Courts of Appeals, but not by the Court below and one other Court of Appeals?

2. Where the FPC refused to allow a fourth hearing to adduce evidence which had been withheld as early as the first, and dismissed for failure of proof respondents'[2] applications for rate increases under Sec. 4 of the

[2] Hereinafter sometimes called "the producers".

Natural Gas Act, which increases the producers had been collecting under bond since early 1955, did the Court below err in remanding the case for the receipt of the withheld evidence since the Court found neither abuse of discretion by the FPC in refusing the fourth hearing nor "reasonable grounds" for the producers' failure previously to adduce such additional evidence, but on the contrary found that the producers had withheld the evidence as a part of their "trial strategy" with knowledge that such evidence might be required to sustain their burden of proof?

Statute Involved

The statutory provisions involved are Secs. 4 and 19 (b) of the Natural Gas Act ("the Act"), 15 U.S.C. Secs. 717 c and 717 r (b). They are printed in Appendix B, *infra*, pp. 81a-84a.

Statement of the Case

Petitioners, distributors of natural gas, seek review of four judgments (Appendix C, *infra*, pp. 85a-88a) remanding rate proceedings to the FPC for the receipt of additional evidence. The proceedings were initiated by applications filed by the producers in 1954 and early 1955 to increase from 9.797¢ per mcf to 17¢ per mcf[3] the rate for gas sold by them to Transcontinental Gas Pipeline Company ("Transco"). Transco is a principal supplier of petitioners.

The higher rate resulted from the operation of automatic price escalation clauses in their contracts with Transco; it was suspended by the FPC (R2391-2394; SR8182-8183) but early in 1955 was permitted to go into effect subject to refund (R2330-2333; SR8246-8247, 8395-

[3] Inclusive of a 1 cent per mcf gathering tax.

8397, 8607-8610) unless shown to be just and reasonable. The higher rate has been collected by the producers since early in 1955. Upon the producers' failure after three rounds of hearings to justify the higher rate, their applications were dismissed, and refunds of some $8,000,000 attributable to the higher rate collected by them under bond were ordered.

The separate proceedings involving the Sun and Union groups followed parallel courses before the FPC. In each proceeding the producers obtained repeated continuances (R2372, 2587-2591, 2623-2626, 2643, 2775; SR8305-8306, 8319, 8449-8450, 8645-8648, 8678-8679), ostensibly for the purpose of preparing the necessary evidence (R3168; SR8305-8306). They thereby delayed the start of the hearings until September, 1955.

When the proceedings actually began petitioners, who had intervened, clearly stated their position that the producers could not sustain their burden of justifying the rate increase without presenting financial data (R49-52; SR65-85); and FPC counsel stated that costs must be considered (SR86-91). The producers understood what was being asked of them, as the Court below found (*infra*, pp. 6a, 11a). The producers, nevertheless, in each of the proceedings, withheld such data with full knowledge that the need for it was an issue (R333-336). Sun argued the inappropriateness of such data (SR1546-1586); Union argued that it would have led to "confusion" (*infra*, p. 6a). The producers' direct cases consisted of evidence that their contracts with Transco were made after arm's-length bargaining and contained price escalation clauses which had become operative; and that the increased rate was comparable to prevailing field prices (R2795; SR8853). Repeated objections were made to the producers' attempt to prove the reasonableness of the higher rate by reference to what others were paying (R291, 325,

367, 374). At the close of the direct cases,[4] counsel for the FPC, joined by petitioners, moved to dismiss the applications for failure of proof (R2792; SR8850). The FPC, in each case, held that the producers' evidence did not justify the rate increase, but postponed action on the motions to give the producers a second opportunity to sustain their burden of proof (R2792-2798; SR8850-8855). In so doing, the FPC stated that the producers were subject to the same criteria for rate-making purposes as were others subject to the Act (R2796; SR8853-8854) and stated that no further extensions of the hearings would be granted (R2797; SR8854-8855).

Hearings were resumed in both proceedings.[5] The Union group again refused to submit cost data, but introduced additional evidence designed to show that prevailing field prices should determine the reasonableness of their rate (R2890); the Sun group followed suit (SR9226-9227). The motions to dismiss were renewed, but the FPC declined to decide them pending the closing of the hearings, which thereupon were re-convened, giving the producers their third opportunity to make their case.[6] Again they held fast to their trial strategy, refusing cost data. The hearings were then closed.

Prior to the examiners' derisions the producers moved for dismissal of the proceedings, claiming the FPC had no jurisdiction over the rate increase. They relied on *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 and *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348,

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[4] Running from September 21-23, 1955 in Union, and from September 12-16, 1955 in Sun.

[5] This second round lasted from November 28-30, 1955 in Union and from November 28—December 5, 1955 in Sun.

[6] The third round occupied March 14, 1956 in Union and January 9 and 10, 1956 in Sun.

(R2583; SR9210). Both motions were denied by the hearing examiners (R2853-2858; SR9210-9213) and both applications for the increased rate were dismissed for failure of justification (R2843-2900; SR9203-9230). The FPC affirmed, two commissioners dissenting in each case (R3050-3068; SR9380-9392). Rehearing was denied in each case (R3167-3176; SR9593-9596) as being contrary to the public interest (R3169; SR9595).

The producers thereupon petitioned for review pursuant to Sec. 19 (b) of the Natural Gas Act urging, among other things, that their evidence of field prices justified the higher rate; that the producers are not natural gas companies and their sales are not subject to the Act; and that the higher rate, resulting from a contract provision, was not a rate change subject to Sec. 4 (d) of the Act. Union and Louisiana Land, in addition, sought leave to adduce additional evidence. Sun, Bel and Rauch did not seek this relief. The Court below held against the producers on each of their claims (*infra*, pp. 12a-13a) but remanded for the taking of additional evidence in justification of the higher rate (*infra*, p. 14a).

Sun asked for rehearing in the Court below and also petitioned this Court for a writ of certiorari (October Term, 1958, No. 167).

Reasons for Granting the Writ

1. The decision of the Court below in remanding for the receipt of additional evidence on the appeals of Sun, Bel and Rauch, absent any request by said producers to the Court below at any stage for leave to adduce additional evidence, is directly in conflict with the decision in *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 226 and with decisions of at least five Courts of Appeals: *Commu-*

nist Party v. *Subversive Activities Control Board*, 254 F. 2d 344, 322-323 (D.C. Cir.); *Swift & Co.* v. *NLRB*, 106 F. 2d 87, 91 (10th Cir.); *Wilson & Co.* v. *NLRB*, 156 F. 2d 577, 579 (10th Cir.), *cert. denied*, 329 U. S. 789; *E. B. Muller & Co.* v. *FTC*, 142 F. 2d 511, 516 (6th Cir.); *California Lumbermen's Council* v. *FTC*, 115 F. 2d 178, 183 (9th Cir.), *cert. denied*, 312 U. S. 709; and *NLRB* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214, 215 (4th Cir.). It is supported by *Mississippi Valley Structural Steel Co.* v. *NLRB*, 145 F. 2d 664, 667 (8th Cir.).

Consolidated Edison holds that a party who has been denied the opportunity to adduce evidence before an administrative tribunal has but one remedy. He must apply to a Court of Appeals under the applicable statutory provision (there Sec. 10 (e) of the National Labor Relations Act) for leave to adduce such evidence. Unless he does so (and Sun, Bel and Rauch did not do so), the refusal of the administrative tribunal to receive the evidence, no matter how arbitrary the refusal, will not be reviewed on appeal.

The provision in Sec. 19 (b) of the Natural Gas Act authorizing applications to the Court of Appeals for leave to adduce additional evidence is the same as that in Sec. 10 (e) of the National Labor Relations Act; in Sec. 5 (c) of the Federal Trade Commission Act; in Sec. 9 (a) of the Securities Act of 1933; in Sec. 25 (a) of the Securities and Exchange Act of 1934; in Sec. 24 of the Public Utility Holding Company Act of 1935; in Sec. 43 (a) of the Investment Company Act; in Sec. 213 (a) of the Investment Advisers Act; and in Sec. 14 (a) of the Subversive Activities Control Act.

With the exception of *Mississippi Valley*, *supra*, and the decisions sought to be reviewed, the Courts of Appeals have uniformly followed *Consolidated Edison* in disallow-

ing appeals from rulings of administrative tribunals excluding evidence if the procedures prescribed by the above provisions have not been followed. Resolution of the conflict on this important point of procedure is desirable in view of the likely frequent recurrence of the problem in a wide variety of contexts.

2. The decisions below are clearly erroneous as we show below. The consequences of this error fall not only on petitioners and their customers but on all consumers of natural gas who depend on the effective administration of the Act for protection against unjustified high rates.

In the four years since *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, the FPC has not been able to decide a single major rate increase application by an independent producer under Sec. 4 of the Act on the merits. There are some 1300 such cases pending involving approximately $60,000,000 collected subject to refund (*i.e.*, collected from consumers without justification as yet). FPC Release No. 9920. The reason for this administrative delay is simply that producers generally, and the instant producers particularly, refuse to acknowledge, despite *Phillips*, that they are natural gas companies subject to rate regulation. In unison they claim that the only regulation possible, if indeed they are natural gas companies, is FPC rubber-stamping of their contracts made at arm's length. See *e.g.*, *Public Service Commission* v. *FPC*, —— F. 2d —— (3d Cir. June 30, 1958.) In other words, they would substitute bargaining for regulation. Producers generally, and the instant producers particularly, consistent with their defiance of *Phillips*, have refused to present the financial data necessary for informed, effective regulation with full knowledge that prior decisions (*e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591; *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581) make such data indispensable in a rate case. They have sought delays at every opportunity

hoping for legislative relief from the rate-making consequences to them of *Phillips*.

This is the setting of the present cases. In such circumstances the FPC was clearly correct in denying to the producers a fourth opportunity to present financial evidence.

And indeed, the Court below did not find any abuse of discretion by the FPC in its denial of rehearings. This was within the FPC's discretion, *ICC* v. *Jersey City*, 322 U. S. 503, 517, and it was entitled to balance (a) these tactics of the producers, deliberately chosen to test the applicability to them of the entire decisional law of rate-making, in the face of repeated demands by petitioners for financial evidence; and (b) the FPC's repeated holdings that the producers had not met their burden of proof; and (c) the mandate of the Act that it decide rate proceedings "as speedily as possible"; and (d) the long pendency of the proceedings; and (e) the interest of millions of consumers in not continuing to pay unjustified rates and in receiving back some $8,000,000 paid on account of these unjustified rates; and (f) the tactics of the producers to delay matters, against the possible hardship to the producers (albeit self-imposed) in being foreclosed. The Court below reversed, not because it found abuse of any discretion, but because it arrogated to itself the discretion vested in the FPC and, in the balancing of interests, it tipped the scales in favor of respondents.

Since the Court below did not find any abuse of discretion by the FPC, the Court's action in sending the proceedings back for additional evidence must have been predicated upon the portion of Sec. 19 (b) of the Act authorizing such relief upon the showing of reasonable grounds for failure previously to adduce such evidence.

This Court has held that "extraordinary circumstances" must be pleaded and found before a Court of Appeals may grant such relief. *NLRB* v. *Mexia Textile Mills*, 339 U. S. 563, 570. The "extraordinary circumstance" here pleaded by the producers was "surprise"—the claim that they had not known until the close of hearings that such evidence might be required to sustain their burden of proof. In fact, of course, these producers had argued for a change of law—for a new kind of rate-making without any financial evidence to serve as a guide. Their arguments had been made with full knowledge that financial evidence had always been an indispensable requisite in rate-making.

The Court below did not even credit the producers' claim of surprise; it found instead that the evidence had been withheld as a matter of "trial strategy" to test the producers' theory of the applicable law (*infra*, p. 6a). In spite of this, the Court remanded; it refused to apply "too strict a rule as to the reception of evidence" (*infra*, p. 11a), thereby enabling the producers to avoid the effects of the expensive "gamble" they had taken. In so doing, it ignored the holding of this Court that the provisions authorizing applications to the Court of Appeals for leave to introduce additional evidence "formulate a familiar principle regarding newly discovered evidence" and "cannot be used to enlarge the statutory scope of judicial review," *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219, 234-235, and of Courts of Appeals that a litigant does not meet the requirement that he show reasonable grounds for reopening if the evidence sought to be adduced has been available all along. *NLRB* v. *Turrell County Lbr. Co.*, 203 F. 2d 951 (4th Cir.); *NLRB* v. *Fournier*, 182 F. 2d 621 (2d Cir.).

But even if, contrary to the finding of the Court below, Union and Louisiana Land had been mistaken in what

was required of them in the way of proof, this was not a reasonable ground justifying the remedy, and the decisions below conflict with *Dietrich* v. *Shipping Board*, 9 F. 2d 733, 746 (2d Cir.), *cert. denied*, 278 U. S. 647 and *NLRB* v. *Aluminum Products Co.*, 120 F. 2d 567, 573 (7th Cir.).

In sum, then, the Court below did not find any "reasonable grounds," as required by the statute. Absent such a finding, the Court below had no discretion to exercise and its action in remanding was erroneous.

The FPC must have power to control its own processes so as to prevent unreasonable delay on the part of natural gas companies subject to its jurisdiction in establishing the justness and reasonableness of their rates, and power to decide with finality so long as it acts within the scope of its statutory authority. The decisions of the Court below effectively strip the FPC of these powers and, to this extent, render ineffectual the mandate of the Act that rate proceedings be decided as quickly as possible.

CONCLUSION

For the foregoing reasons, this cross-petition and petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16581

BEL OIL CORPORATION,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

No. 16583

UNION OIL COMPANY OF CALIFORNIA and THE LOUISIANA LAND AND EXPLORATION COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

No. 16584

MORRIS RAUCH, ET AL.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION.

(April 23, 1958.)

Before TUTTLE, JONES and WISDOM, Circuit Judges.

TUTTLE, Circuit Judge: These petitions, presented on a single record, seek review of an order of the Federal

Power Commission, Opinion No. 300, reported at 16 F.P.C. 100-118, dismissing certain rate filings of the petitioners as independent producer natural gas companies.[1] The rate increases would have been from 8.79 cents to 16 cents per Mcf, plus a 1 cent state tax.

On June 9, 1954, the three parties all had contracts with Transcontinental Gas Pipe Line Corporation (Transco), under which they agreed to furnish certain minimum quantities of gas for a period of twenty years, for which the price was fixed "temporarily" at 8.7915 cents per Mcf until November 1, 1954, and 16 cents per Mcf thereafter, with an automatic escalation of one cent every five years. It was on June 7, 1954, that the Supreme Court decided *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672. The Commission subsequently, by Orders 174, 174A and 174B permitted all independent natural gas companies engaged on or since June 7th in jurisdictional sales to file their rates in effect on that date without any supporting data to justify any increases that had theretofore been put into effect. The companies were permitted to file copies of their contracts in lieu of detailed rate schedules.

Petitioners filed their contracts, all of which provided for an automatic increase, on November 1, 1954. Two of the petitioners also filed notice of the increase to 16 cents. The Commission thereupon ordered all of these increases suspended under the authority of Section 4(e) of the Act.

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[1] In view of the holding by this Court in *Deep South Oil Co.* v. *F.P.C.*, 5 Cir., 247 F. 2d 882; *Shell Oil Co.* v. *F.P.C.*, 247 F. 2d 900, cert. den. 355 U. S. 930; *Humble Oil & Refining Co.* v. *F.P.C.*, 5 Cir., 247 F. 2d 903, cert. den. 355 U. S. 930; and *Continental Oil Co.* v. *F.P.C.*, 5 Cir. 247 F. 2d 904, we do not give further consideration to the contention that these are not natural gas companies within the purview of the Natural Gas Act, 15 U. S. C. A. 717.

After the period of suspension the rates were permitted to go into effect under the terms of the Act which require reimbursement by petitioners if they should not ultimately be entitled to the rate charged.

A number of local distributing companies and state commissions intervened to oppose the rate increase and Transco intervened on behalf of the petitioners.

After several postponements, urged by petitioners, extended hearings were held. In general it can be stated that the evidence offered by petitioners consisted of proof of the competitive conditions in the Louisiana fields, the contracts negotiated by petitioners and others in that field, and evidence that the contracts were negotiated at arm's length. After the presentation was concluded, without any cross examination or counter proof by intervenors, a motion was made to dismiss on the ground that applicants had not sustained their burden of proof that the higher rate was "just and reasonable."

The Commission entered its "Order Postponing Action on Motion to Dismiss and Referring Proceedings to Examiner" in which it said:

> "• • • The fact that contracts have been entered into in good faith and in arm's-length bargaining does not make them immune from the regulation in the public interest prescribed by Congress, nor are producer contract terms per se an indication that the prices agreed upon are just and reasonable either initially or as subsequently increased pursuant to escalation clauses or otherwise. (See Colorado Interstate Gas Co. *v.* F.P.C., 142 F. 2d 943, 953 (C.A. 10, 1944), aff. 342 U. S. 581; Mississippi River Fuel Corp. *v.* F.P.C., 121 F. 2d 459, 163 (C.A. 8, 1941).)

"The exhibit submitted by applicants to show relative field prices is merely a numerical listing of contract prices for gas sold within the pricing area and is insufficient to justify the proposed increases.

"It may be observed that in providing for Commission responsibility in connection with rate filings the Natural Gas Act makes no distinction between independent producers and interstate pipeline companies. If they are subject to the Act, the same criteria and procedures are prescribed for rate-fixing purposes, since both classes are natural gas companies under the Act. The Commission is free, within the ambit of its statutory authority in rate fixing, to make the pragmatic adjustments which may be called for by particular circumstances (F.P.C. *v.* Natural Gas Pipeline Co., 315 U. S. 575, 586). While it is true that the source of our authority over rates of independent producers is contained in Sections (4) and (5) of the Natural Gas Act, we do not say that in fixing the rates of natural gas companies which are independent producers we are compelled to apply the same formula as that applied in fixing the rates of natural gas companies which are interstate pipeline companies.

"In dealing with the rates of interstate pipeline companies, we have pointed to the burden placed by Section 4(e) of the Act upon those natural gas companies seeking approval for rate increases and in appropriated cases have pointed to the failing of some companies to present evidence which would justify the increases, for which reason we have denied applications for approval, and in these actions we have judicial approval. (Mississippi River Fuel Corp. *v.* F.P.C., 121 F. 2d 159, 165 (C.A. 8, 1941).) The independent producers which are applicants herein are under the same burden as

interstate pipeline companies to justify any proposed rate increases, even if their operations may differ.

"Upon consideration of all these matters and the evidence so far presented, we would be required to grant the motion to dismiss and to terminate these proceedings, for the evidence does not show that the requested increased rates would be just and reasonable. Nevertheless, solely because this is the first series of cases involving the rates of independent producers upon which we have acted, we will allow Applicants a further period of time beyond which we do not propose to extend the resumption of the hearing, rather than granting the motion to dismiss forthwith.

* * *

"The Applicants should now be fully prepared to demonstrate the lawfulness of the proposed increases or we must deny the applications and dismiss the proceedings. Reasonable consideration of the rights of the other parties and of the general public will justify no further delays."

Upon the reconvened hearing petitioners introduced additional evidence tending to show that petitioners did not possess any dominating position in the industry, that natural gas is competitive with other non-regulated fuels, that the proposed prices were comparable with unregulated prices for local consumption; that maintenance of such a price is necessary to provide appropriate incentives for exploration and production of natural gas in Louisiana. No evidence was offered to show the actual cost of service to the producers—that is no evidence as to any economic factors related to their financial interests or needs, none as to operating expenses or

capital costs, as to the return or profits they were earning under the 8.79 cent rate or which they would earn under the 16 cent rate, no evidence to indicate whether the rate was necessary to maintain credit and to attract capital. It can fairly be assumed, we think, that the failure to adduce such evidence was part of petitioners' trial strategy to make more persuasive their argument in favor of a field price basis, for rate purposes, for in the brief of Union Oil is the following statement:

> "It was the judgment of petitioners that evidence of that type would have led to confusion in the presentation of their case and prejudiced the chances of acceptance by the Commission of the principles which petitioners urged on the commission as the proper basis of regulation."

Because of the absence of the financial type of evidence, a motion was again made for a dismissal of the application. The Commission referred the case back to the Examiner to make his report, the record was opened for cross examination by interveners, which they waived, and thereafter the Examiner filed his report recommending dismissal because of the failure of petitioners to make out a prima facie case of reasonableness. The Commission, two members dissenting, held that there was a failure to make out a prima facie case of just and reasonable rate and granted the motion to dismiss. The Commission, for the first time, gave a strong indication of what it considered to be essential in the proof of just and reasonable rates. It said:

> "We think the recent decision of the Court of Appeals for the District of Columbia circuit, in

> City of Detroit *v.* Federal Power Commission, 230 F. 2d 810, cert. den. 352 U.S. 829, is controlling here."

That part of the City of Detroit decision germane to the Commission's discussion is:

> "For, though we hold that method [the rate base or cost of service method] not to be the only one available under the statute, it is essential in such a case as this, that it be used as a basis of comparison. It has been repeatedly used by the Commission, and repeatedly approved by the courts, as a means of arriving at lawful—'just and reasonable' rates under the Act. Unless it is continued to be used at least as a point of departure, the whole experience under the Act is discarded and no anchor, as it were, is available by which to hold the terms 'just and reasonable' to some recognizable meaning."

Following the order of dismissal, petitioners filed motions for rehearing and asked that the matter be referred once against to the examiner to permit petitioners to tender evidence of cost of service. The motions were denied.

Petitioners strongly contend that they urged the field price, or cost of commodity, evidence as adequate to support a finding of a just and reasonable rate in the best of faith, relying in great part, so they say, on representations to that effect by the Commission itself. They say the Commission in the Panhandle Eastern Pipe Line Co. case, Opinion No. 269, which is the case later reversed by the Court of Appeals for the District of Columbia Circuit, quoted from above sub nom. *City of Detroit v. Federal Power Commission,* valued the natural gas produced by an interstate pipe line company for rate

making purposes on the basis of fair field price rather than on the basis of a calculated rate of return on the company's investment in its producing properties. They say that in applying to the Supreme Court for certiorari in the City of Detroit case, the Commission still stood on the field price theory of rate making. They also point out that the Commission, in its 1956 Report to Congress,[2] recommended an amendment to the Natural Gas Act as follows:

> "A standard for pricing or evaluating natural gas as a commodity which would not require use of a rate base or traditional utility ratemaking principles, but which would enable the Commission to weigh the interests of the consumer in low prices with the necessity of providing assurance of future gas supplies;"

Petitioners argue from this record and in light of these circumstances, together with the broad scope which the Supreme Court says resides in the Commission in its ascertainment of a just and reasonable rate, first that the evidence was sufficient to establish a prima facie case, and second, if not, it excused their failure to offer the cost of service evidence at the two hearings and the case should be remanded to the Commission to permit them to do so.

In support of the first position, petitioners cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591:

> "Congress, however, has provided no formula by which the 'just and reasonable' rate is to be determined. 320 U. S. 591, 600.

[2] 1956 Annual Report of the Federal Power Commission, p. 19.

The Court also said:

> "We held in Federal Power Commission *v.* Natural Gas Pipeline Co., supra, that the Commission was not bound to the use of any single formula or combination of formula in determining rates. Its rate making function, moreover, involves the making of 'pragmatic adjustments.' Id., p. 586. And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in the entirety' meets the requirements of the Act. Id., p. 586. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. Cf. Los Angeles Gas & Electric Corp. *v.* Railroad Commission, 289 U. S. 287, 304-305, 314; West Ohio Gas Co. *v.* Public Utilities Commission (No. 1), 294 U. S. 63, 70; West v. Chesapeake & Potomac Tel. Co., 295 U. S. 662, 692-693 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." 320 U. S. 591 602.

See also in this connection, *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586, and *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581.

We cannot agree that these cases are authority for the proposition that the evidence thus far adduced makes out a prima facie case of reasonableness of the contract price of 16 cents. We do not hold that evidence of field price is irrelevant. We do hold that evidence of unregulated prices in the field is not sufficient to warrant a finding by the Commission that a price comparable to them is just

and reasonable within the intendment of the Natural Gas Act. Neither is evidence of the field price when coupled with the opinion of experts that the price must be high enough to provide an incentive for exploration and development of new sources of supply.

Our attention has been called to the opinion and order issued on April 4, 1958, in the matter of Pan American Petroleum Corp., et al, Opinion No. 310, in which the Commission has found just and reasonable an increased rate from 75 to 85 cents per Mcf for an Oklahoma field without requiring proof of cost of service. Without having the record of that case before us, it is apparent that the Commission has nevertheless withdrawn somewhat from the generality of its holding that a rate-base method must in all events be used at least as a point of departure. Recognizing, however, as we do that the rate increase there was an extremely modest one, we do not conclude from that order that the Commission intends to abandon its position taken as to the petitioners here. In fact the opinion seeks to distinguish these cases. Some of the points of distinction are not, we think, significant. Without deciding that the rate-base method is essential in every rate case, we agree that the Commission did not have sufficient evidence before it to approve these rates as just and reasonable.

Upon the second position taken by the petitioners, however, we conclude that the Commission erred in the particular circumstances of these proceedings in not reopening the hearings once again to permit the petitioners to introduce evidence of a rate base which in its written opinion, after the close of the hearing, the Commission said for the first time is an essential part of such an

inquiry. We fully share the Commission's conclusion that petitioners were not unaware during the two years of pendency of the matter that evidences of cost of service might in the end be an important part of the proof they would have to make. The Commission takes the position that, with ample warning of the inadequacy of their proof, the failure of petitioners to come forward with such evidence amounted to a calculated gamble by them which they lost, and that they should not be entitled to another opportunity to make out their case. If indeed petitioners made such a gamble, it was an expensive one. If this order stands, the petitioners in this and other cases dealt with by the Court at this time, are required to account for to their customers a substantial sum of between seven and eight million dollars, all or part of which they may really be entitled to keep if their proof finally wins the approval of the Commission of a higher rate. In such circumstances some parties would be unjustly enriched and petitioners would be heavily penalized without reference to the real merits of the controversy.

The regulation of the prices at which thousands of "natural gas companies" may sell to the pipe line companies is a difficult one at its best. It is a field which in many respects requires new formulas to test what is just and reasonable. We think it would be an unjust penalty if we were to apply too strict a rule as to the reception of evidence in such a case. This is clearly demonstrated by order No. 310 in Pan American Petroleum Corporation referred to above. We think it quite clear that in light of that order the Commission might adopt some pragmatic standard to apply to these cases as it did with Pan American, et al.

Holding as we do that the proof was insufficient but that reasonable opportunity should be given to petitioners to bring forth additional proof, we think that we need not notice many of the other contentions of petitioners at this time. We do, however, hold that in line with our previous cases cited in footnote 1, *supra*, these petitioners are "independent producers" and "natural gas companies" and their sales are subject to regulation under the Act.

We also conclude that even though the increases here in issue had been predetermined by contract before the Supreme Court's decision of the Phillips case and thus before the cut-off date of June 7, 1954, they are "rate changes" subject to Section 4(d) of the Act[3] and not an initial rate subject to changes under Section 5(a) of the Act. Section 5(a) places the burden on the Commission or other moving party to prove the initial rate unjust or unreasonable. We passed on a similar question in *Mississippi Power & Light Co.* v. *Memphis Natural Gas Company*, 5 Cir., 162 F. 2d 388, cert. den. 322 U.S. 770, where the contract had a "favored nation" clause in it

[3] "Rates and Charges; Schedules; Suspension of New Rates. Sec. 4.

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

15 U. S. C. A. §717(c)(d).

under which the consumer company contended it was entitled to an automatic reduction in rate. We said there:

> "The 'favored nation' clause became inoperative after the passage of the Natural Gas Act. Section 4 thereof provides: '* * * every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation or sale * * *' and 'no change shall be made by any natural-gas company in any such rate * * * except after thirty days' notice to the Commission and to the public * * *.'
>
> "Rate making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function. To give effect to the 'favored nation' clause would operate to transfer the legislative function of rate-making from the Commission to the courts."

See also *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 10 Cir., 232 F. 2d 726.

What we have said with respect to the new rate being a change within contemplation of the Act also answers the complaint by petitioners that the Series 174 orders of the Commission are invalid as applied to them in view of the fact that they had already contracted for the increases prior to June 7, 1954. As pointed out in *Cities Service Gas Producing Co.* v. *Federal Power Commission*, *supra*, the Act itself forbids any changes in rates except under the terms of the Act. So far as is here relevant, all the 174 orders do is to implement this provision of the statute.

Other contentions of petitioners whose resolution is not implicit in the decision we now make, are not now passed upon but will await the completion of the record before the Commission.

Opinion of Court of Appeals on Appeal of Union Group

The petition is granted to the extent that the Commission is directed to reopen these proceedings to afford petitioners reasonable opportunity to adduce such evidence as they may be advised is relevant to the inquiry whether the proposed rate of 16 cents plus 1 cent state tax is just and reasonable. In all other respects the petition is

DENIED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16722

SUN OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 16724

SOHIO PETROLEUM COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 16725

MARACAIBO OIL EXPLORATION CORPORATION, AND E. J. HUDSON, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

Opinion of Court of Appeals on Appeal of Sun Group

PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION.

(April 23, 1958.)

Before TUTTLE, JONES and WISDOM, Circuit Judges.

TUTTLE, Circuit Judge: These three cases were tried by the Federal Power Commission on a single record and they are consolidated for hearing and argument here. The only substantial difference between them and others heretofore discussed in the opinions published today is not one which gives any new or added ground for a different holding on the merits or on the propriety of the Commission's hearing proceedings under Section 4(d) of the Act.

The higher rates sought by these petitioners came into effect as between them and Transco, the pipe line company, because petitioners were the beneficiaries of a two-party "favored nation" clause in the contract. The higher prices paid by Transco which triggered the increase here were those which Union Oil Corporation, et al., sought to put into effect and which are the source of litigation in *Bel Oil Corporation v. Federal Power Commission*, 5 Cir., — F.2d —, decided today.

The petition is granted to the extent that the Commission is directed to reopen these proceedings to afford petitioners reasonable opportunity to adduce such evidence as they may be advised is relevant to the inquiry whether the proposed rate of 16 cents plus 1 cent state tax is just and reasonable. In all other respects the petition is

DENIED.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matters of

UNION OIL COMPANY OF CALIFORNIA	Docket No. G-4331
UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY	Docket No. G-4332
MORRIS RAUCH, *et al.*	Docket No. G-4334
BEL OIL CORPORATION	Docket No. G-4505

Opinion No. 300

OPINION AND ORDER AFFIRMING INITIAL DECISION OF PRESIDING EXAMINER

(Issued December 6, 1956)

These are rate proceedings arising under Sections 4 and 15 of the Natural Gas Act involving increased rates and charges for sales of natural gas by several independent producers to Transcontinental Gas Pipe Line Corporation (Transcontinental). The increased rates, proposed to become effective as of November 1, 1954, were filed by Union Oil Company of California (Union Oil) (docket No. G-

4331),[1] jointly by Union Oil and Louisiana Land and Exploration Company (Louisiana Land Company) (docket No. G-4332),[2]

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and by Morris Rauch, *et al.* (docket No. G-4334)[3] on September 30, 1954, and by Bel Oil Corporation (Bel Oil) (docket No. G-4505)[4] on October 4, 1954. The rates and charges filed by the independent-producer applicants would increase the rates to Transcontinental for the sale of gas from those applicants from 9.797¢ per Mcf to 17¢ per Mcf, including a 1¢ per Mcf gathering tax. The over-all effect would be to increase Transcontinental's purchased gas costs by approximately $2,600,000 annually, based upon estimated volumes taken in the year ending November 1, 1955. Finding that the increased rates might be unjust and unreasonable, we ordered a hearing to be held concerning their lawfulness and suspended their use until February 1, 1955. Since February 1, 1955 (February 2, 1955, in the case of Bel Oil), the increased rates have been in effect subject to refund.

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[1] The increased rates and charges filed by Union Oil on September 30, 1954, are contained in its FPC Gas Rate Schedule No. 2, together with Supplements Nos. 1, 2 and 3 thereto, its FPC Gas Rate Schedule No. 3, together with Supplement No. 1 thereto, and its FPC Gas Rate Schedule No. 4, together with Supplement No. 1 thereto.

[2] The increased rates and charges filed jointly by Union Oil and Louisiana Land Company on September 30, 1954, are contained in their FPC Gas Rate Schedule No. 5, together with Supplements Nos. 1 and 2 thereto, and their FPC Gas Rate Schedule No. 6, together with Supplements Nos. 1 and 2 thereto.

[3] The increased rates and charges filed by Morris Rauch, *et al.* on September 30, 1954, are contained in Supplement No. 1 to their FPC Gas Rate Schedule No. 1, and Supplement No. 1 to Supplement No. 1 to their FPC Gas Rate Schedule No. 1. Other parties in docket No. G-4334 are: Johnny Mitchell, Trustee, W. H. Zinn, Louis Pulaski, E. J. Pulaski and Rheba Joan Spiner, Executor and Executrix of Estate of Harry Pulaski.

[4] The increased rates and charges filed by Bel Oil on October 4, 1954, are contained in Supplement No. 1 to its FPC Gas Rate Schedule No. 3.

Opinion of FPC on Dismissal of Union Group Rate Increase Applications

(3054)

Procedural and factual background

Consolidated hearings were first held in these proceedings on September 21 through September 23, 1955,[5] at which time the applicants presented their case-in-chief, consisting primarily of evidence of arm's-length bargaining and of area or field prices, but containing no evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves. At these hearings Transcontinental, which, as purchaser, had agreed to the increased rates, intervened and participated in support of the applicants' position. Several distribution companies, customers of Transcontinental (herein referred to as "distribution companies") and the Public Service Commission of the State of New York intervened and participated in opposition to the increased rates.[6]

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At the conclusion of the applicants' case-in-chief, the New York Public Service Commission moved to dismiss for failure on the part of the applicants to sustain their burden of proof under Section 4 of the Natural Gas Act. The motion was joined in by the distribution companies and by staff counsel.

Since granting the motion would have been dispositive of the proceedings, it was certified to us by the presiding

[5] Hearings in docket Nos. G-4331 and G-4332 were originally scheduled for March 8, 1955, but were postponed four times at the request of Union Oil and were finally consolidated with docket Nos. G-4334 and G-4505 for hearing on September 21, 1955.

[6] The customers of Transcontinental which intervened and participated in opposition to the increased rates are: The United Gas Improvement Company, Public Service Electric and Gas Company, Philadelphia Electric Company, South Jersey Gas Company, Consolidated Edison Company of New York, Inc., Kings County Lighting Company, Brooklyn Union Gas Company, Elizabethtown Consolidated Gas Company, and Long Island Lighting Company.

examiner for decision. By order issued October 24, 1955, we stated that, although in ordinary circumstances we would be required to grant the motion to dismiss and to terminate the proceedings, in this case, "solely because this is the first series of cases involving the rates of independent producers upon which we have acted, we will allow applicants a further period of time beyond which we do not propose to extend the resumption of the hearing, rather than granting the motion to dismiss forthwith. If, when the hearing is resumed, the applicants avail themselves of the opportunity to present more substantial evidence that their proposed increases are just and reasonable, the evidence should be considered." For this reason we postponed action on the motion to dismiss pending completion of the hearings.

Hearings were resumed on November 28, 1955, at which time the applicants presented additional evidence but still declined to present evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves. At the conclusion of the applicants' case, the New York Public Service Commission renewed its motion to dismiss on the ground that the additional evidence failed to discharge the burden of proof. Staff counsel also moved to dismiss for failure to discharge the burden of proof based upon the evidence of the entire record.[1]

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[1] In total, there were 37 exhibits offered in evidence by Union Oil and Louisiana Land Company. Also, Items A through U were incorporated by reference to the Commission's files. Two exhibits, Nos. 34 and 37, were excluded by the presiding examiner. The document offered as Exhibit No. 34 was entitled "Field Prices for Natural Gas in the Gulf Coast Area."

Union Oil's offer as Exhibit No. 37 is a statement by Mr. John B. Hussey, Commissioner of Conservation of the State of Louisiana. The presiding examiner excluded the document on the ground that it was not evidence but could be more properly classified as argument to support a contention that federal regulation over producers should be abolished. Accordingly, the pre-

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When these motions were certified to the Commission, we directed, by order issued January 23, 1956, that action upon them be postponed until the conclusion of the hearings and the submission of the initial decision of the presiding examiner. At the resumption of hearings on March 14, 1956, all parties waived cross-examination of the applicants' witnesses and the hearing was concluded. At this point staff counsel renewed the motion to dismiss. The New York Commission and several distribution companies joined in the motion.

Prior to the issuance of the decision of the presiding examiner, Union Oil and Louisiana Land Company and Bel Oil filed motions to terminate the proceedings for lack of jurisdiction, basing their argument upon their interpretation of the legal effect of the decisions of the Supreme Court of the United States in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 432 (1956), and *Federal Power Commission* v. *Sierra Pacific Power Company*, 350 U.S. 448 (1956).

In his decision issued on May 2, 1956, the presiding examiner denied the motions to terminate for lack of jurisdiction and granted the motions to dismiss the rate increase applications for failure on the part of the applicants to discharge their burden of proof to show that the increased rates and charges are just and reasonable. Exceptions were filed by the applicants, Transcontinental and

siding examiner received Mr. Hussey's statement as a "statement of position" only. In order that the record may be as complete as possible under the circumstances of this case, we overrule the presiding examiner and admit Exhibit Nos. 34 and 37 in evidence.

the Staff.[8] We heard oral argument on June 28, 1956, and reargument on September 5, 1956.[9]

These proceedings present for our resolution the basic question whether the evidence presented by the applicants is sufficient to support a finding that the increased rates of 17¢ per Mcf are just and reasonable within the meaning of the Natural Gas Act. More precisely defined, does the Natural Gas Act permit the Commission to approve the increased rates sought to be justified here through evidence of arm's-length bargaining, field prices and commodity or market value of the gas when there

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is no evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves?

Prior to our consideration of the major issue raised by the motions to dismiss filed by the New York Commission, staff counsel and others, we should first consider briefly the contentions of Union Oil and Louisiana Land Company and Bel Oil that we lack jurisdiction to determine the just and reasonable rates in these proceedings. Union Oil and Louisiana Land Company filed a motion on March 22, 1956, to terminate the proceedings for lack of jurisdiction. Bel Oil filed a motion to the same effect on April 2, 1956. Both motions urge that the decisions of the Supreme Court of the United States in the *Mobile* and the *Sierra Pacific* cases, *supra*, bar suspension of the effective

[8] The staff did not except to the result reached by the presiding examiner but took issue with a statement that the decision of the Court of Appeals for the District of Columbia Circuit in *City of Detroit* v. *Panhandle Eastern Pipe Line Company*, 230 F. 2d 810 (C.A.D.C., 1956) might be a controlling precedent in these proceedings.

[9] By order issued June 18, 1956, we denied a motion filed on May 25, 1956, by Morris Rauch, *et al.*, in docket No. G-4334, requesting that the Commission sever that docket from the consolidated proceedings and reopen the proceedings in docket No. G-4334 for the presentation of cost evidence.

ness of the new rates and Commission review of them under Section 4 of the Act. We find that the decision of the presiding examiner adequately disposes of this contention and we specifically affirm his decision on this point.

It is clear that the contracts containing the increased rates filed by Union Oil and the other applicants with the agreement of the purchaser, Transcontinental, are precisely the kind of contract which the Supreme Court determined to be subject to suspension and review under Section 4 of the Act. The Court's condemnation of unilateral filings in the *Mobile* case was based upon its interpretation that section 4 provides for the filing, notice, and Commission review of changes in contracts which would be "otherwise valid." Since United Gas Pipe Line Company's proposed change to Mobile Gas Service Corporation was a unilateral change of a contract rate, it was not an "otherwise valid" change. Here, however, both buyer and sellers have agreed to the changes. It is our duty under section 4 to review these rates agreed to between the parties to determine whether they conform to the standards laid down in the Act. Therefore, we deny the motions to terminate the proceedings for lack of jurisdiction filed by Union Oil, Louisiana Land Company and Bel Oil.

Turning to the main issue, we are confronted with the applicants' contention that they have, as a matter of law, established a *prima facie* case and that the Commission is thereby precluded from dismissing these proceedings. Applicants allege that if there is anything in the record tending to support their claim that the prices are just and reasonable a *prima facie* case has been established as a matter of law. They concede, however, that they must first "produce evidence upon which the Commission could legally grant the requested price increase without being reversed by an Appellate Court." Upon careful consideration of the entire record, we find the applicants have

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failed to submit evidence on which we could determine that, as a matter of law, the rates here in question are just and reasonable. Accordingly, the motions to dismiss must be granted.

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We are mindful that in a motion to dismiss all presumptions and inferences reasonably to be drawn from the evidence must be determined in favor of the respondents to the motion. But we may not presume the change in the law which would be prerequisite to a finding that the respondents had sustained their burden of proof.

The record shows that the gas sold to Transcontinental by each of the applicants in these proceedings is produced from fields in southern Louisiana and sold and delivered to Transcontinental in the production fields. Transcontinental transports the gas so received to markets along the eastern seaboard as far north as the New York City area, where it is resold either directly to industrial consumers or to distribution companies for further distribution and resale to ultimate consumers. These consolidated proceedings involve increased rates contained in seven contracts for the sale of natural gas to Transcontinental. In three contracts Union Oil is the seller (docket No. G-4331); in two contracts Union Oil and Louisiana Land Company are joint sellers (docket No. G-4332); in one contract Morris Rauch, *et al.* are sellers (docket No. G-4334); and Bel Oil also sells gas to Transcontinental under one contract (docket No. G-4505). All contracts here subject to our review provide the same rate to be effective as of November 1, 1954, namely 17¢ per Mcf, including a 1¢ per Mcf Louisiana gathering tax reimbursement.[10] The

[10] Throughout this opinion the contract rates proposed to be effective November 1, 1954, are referred to as 17¢ rates. These are the same rates sometimes referred to by the applicants or other parties as 16¢ rates plus a 1¢ per Mcf tax reimbursement, or simply as 16¢ rates

17¢ rates of Morris Rauch, *et al.* and Bel Oil apparently derive from Transcontinental's agreement to pay 17¢ per Mcf to Union Oil and Louisiana Land Company commencing November 1, 1954. Unless otherwise noted, our discussion herein will be in terms of the contentions of the applicants considered jointly.

The basic contract between Union Oil and Louisiana Land Company, on the one hand, and Transcontinental, on the other, was executed on May 4, 1948, and covered the sale of natural gas produced from the following fields in southern Louisiana: East White Lake, West White Lake, Fresh Water Bayou, Vinton and Tigre Lagoon. The term of this basic contract was 20 years from the date of initial delivery. The contract provided for deliveries of 50,000 Mcf per day as a minimum and 60,000 Mcf per day as a maximum. The price was 7.647¢ per Mcf at 15.025 psia for the first five-year period, with 1¢ per Mcf increases during each of the following five-year periods. The contract contained a two-party favored-nation clause,

a third-party favored-nation clause, and a *bona fide* offer provision, all of which were applicable to a pricing area consisting of 25 parishes in southern Louisiana.[11]

This contract was amended from time to time and, on February 2, 1951, Transcontinental agreed to reimburse Union Oil and Louisiana Land Company for the Louisiana

[11] The two-party favored-nation clause provided that if Transcontinental purchased gas from any other seller within the same pricing area at a higher price, the price to Union Oil and Louisiana Land Company would have to be increased to meet that price. The third-party favored-nation clause provided that if any other purchaser paid any seller or producer a higher price within the pricing area, Union Oil and Louisiana Land Company could demand the payment of such higher price from Transcontinental. The *bona fide* offer provision required Transcontinental to meet any *bona fide* offer made to Union Oil and Louisiana Land Company at an increased price for the gas being sold under the contract.

gathering tax of 1¢ per Mcf. Further, on September 6, 1952, the parties entered into an agreement increasing the price to 9.797¢ per Mcf, including the 1¢ tax reimbursement. This price was to be effective for an interim period from July 1, 1952, until November 1, 1954. As a part of the agreement, operation of the third-party favored-nation clause was suspended during the interim period.

During this period Union Oil and Louisiana Land Company conducted negotiations with Trancontinental looking toward an upward revision of the price. These negotiations were apparently motivated by operation of favored-nation clauses in the basic contract. The record shows that Transcontinental was faced with the fact that several other purchasers were offering to pay considerably more than the 9.797¢ interim rate. Rates as high as 20¢ per Mcf were being offered in the area. Under favored-nation clauses the applicants might demand that Transcontinental pay the 20¢ rate. Nonetheless, Transcontinental, because it felt it could not afford the 20¢ rate, resisted the full increase, explored the possibility of acquiring supplies elsewhere and finally bargained for the 17¢ rate here involved.

On November 17, 1953, the basic contract was superseded by five new contracts covering sales from each of the above-mentioned fields. The new contracts each provided for a price of 17¢ per Mcf, including the 1¢ tax reimbursement, to be effective from November 1, 1954, to November 1, 1959. Provision was made for price escalation of 1¢ per Mcf during each of the three remaining five-year periods of the new contracts. Additionally, the renegotiated contracts increased the estimated gas reserves dedicated to Transcontinental by 383 million Mcf and, on July 8, 1954, Union Oil dedicated reserves of another 100 million Mcf to the performance of the contracts. The maximum daily take, which had been previously raised from

60,000 Mcf to 87,000 Mcf, was increased to 125,000 Mcf. The third-party favored-nation clause and *bona fide* offer provision were dropped, and the applicability of the two-party favored-nation clause was restricted to eliminate all parishes in southern Louisiana east of the Mississippi River. The new contracts with Union Oil and Louisiana Land Company were to be effective for a new 20-year term beginning November 1, 1954.

The contract between Morris Rauch, *et al.* and Transcontinental dated June 9, 1953, covers the sale of gas produced from the Vinton Field. It is for a term of 20 years and provides for deliveries of 350 Mcf per day as a minimum and 500 Mcf per day as a maximum. The initial price for the period up to November 1, 1954, was 9.797¢ per Mcf, including the 1¢ tax reimbursement. By letter dated August 13, 1954, Transcontinental informed Morris Rauch and the other sellers of the proposed increase to 17¢ per Mcf, to be effective from November 1, 1954, under the new contracts with Union Oil and Louisiana Land Company. Accordingly, Transcontinental agreed that the price to Morris Rauch, *et al.* would increase to that level on November 1, 1954, under the two-party favored-nation clause contained in the contract.

The contract between Bel Oil and Transcontinental, dated May 27, 1954, covers the sale of gas produced from the North Elkton Field. It is for a term of 20 years and provides for deliveries of 4,500 Mcf per day as a minimum and 6,000 Mcf per day as a maximum. The initial price contained in the contract was 9.797¢ per Mcf, including the 1¢ tax reimbursement, until November 1, 1954. From that date the contract provided for a rate of 17¢ per Mcf until November 1, 1959, with 1¢ per Mcf increases for each of the three remaining five-year periods.

To support these increased rates, the applicants adduced

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evidence at the initial hearings that the 17¢ rates result from arm's-length bargaining between the parties and that they fall within the lower range of the prices paid to other producers in the same pricing area in southern Louisiana. It is unnecessary to repeat in detail our analysis of the evidence presented by the applicants in the initial hearings in these proceedings held in September of 1955. Reference to our order issued October 24, 1955, postponing action on the motion to dismiss shows that we there discussed the character of the applicants' evidence and indicated at that time that such evidence was not sufficient to sustain the burden of proof imposed upon the applicants by Section 4 (e) of the Act. After noting that the Act makes no distinction between independent-producer natural-gas companies and interstate pipeline natural-gas companies with respect to the criteria of proof in rate increase proceedings, we returned the record to the presiding examiner in order that the applicants could present any additional evidence which they desired to rely upon to justify the increased rates.

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At the resumption of hearings, the applicants presented a number of exhibits which the presiding examiner characterized in his decision as consisting chiefly of material designed to persuade the Commission that a field or market price method constitutes the only proper and reasonable method of fixing producer rates and that the adoption of any other method would damage the public interest in the long run. The presiding examiner held that the bulk of the new evidence was designed simply to persuade the Commission that the public interest requires that the market price evidence found insufficient in the first hearing should now be held adequate. Additionally, he termed the new evidence a policy argument based upon general

statistical data to the effect that producer rates should be left to "regulation by the law of supply and demand."

In their exceptions, applicants object to this characterization of their evidence by the presiding examiner. They claim that the 17¢ rate is lawful and just and reasonable because it resulted from renegotiation of the superseded contract between nonaffiliates at arm's-length; because the 17¢ rate was supported by valuable considerations flowing to Transcontinental; and because the new contract price did not then and does not now exceed the "reasonable market price" for sales of comparable quantities under comparable demands in the pricing area. As further evidence of "reasonableness" the applicants point to the fact that Transcontinental supports the contract rate.

Legal and factual conclusions

The sum total of the evidence presented by the applicants at both hearings demonstrates that the increased rates were reached as a result of arm's-length bargaining and that they are within the range of the field prices in the pricing area in southern Louisiana. It further shows that to exact this price of 17¢ per Mcf the applicants were required to grant additional considerations to Transcontinental, such as increased dedicated reserves. It is also clear from the evidence presented that the growing demands for gas by Transcontinental's customers in the industrial and heavily populated New York-New Jersey-Pennsylvania area are translated through Transcontinental to increasing demands for gas in the field. The applicants' evidence further tends to establish that the price of gas as sold by Transcontinental to its customers in the New York-New Jersey-Pennsylvania area competes favorably with the prices of coal and fuel oil for space hearing [sic] and boiler fuel uses.

Significantly, none of the evidence presented by the ap-

plicants is designed to show what rates are needed, either by individual producers or by the industry generally, to further exploration or other production functions. Neither can rates be determined in any way from the evidence before us.

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General statements by expert witnesses to the effect that increased rates are needed or desirable as an incentive to continued exploration and development of gas supplies are not evidence that the 17¢ rates are just and reasonable for the sales of gas to Transcontinental by these applicants.

The applicants assert that the added considerations offered by Union Oil and Louisiana Land Company and received by Transcontinental establish the justness and reasonableness of the 17¢ rates. Undoubtedly, these were the results of hard bargaining and Transcontinental may be in a stronger position in some respects than it was before these added considerations were extended to it by the sellers. The function of the regulatory agency, however, is not to probe the processes which culminated in these revised contractual relationships between the buyer and the sellers. Rather, ours is to find whether, as a result of these bargaining processes, the parties have fixed upon a rate which, in addition to protecting their private interests, is in the public interest. Viewed in this light, it is evident that no enumeration of added considerations nor succession of contractual concessions will, as a matter of law, demonstrate the reasonableness of a rate level. They are little more than evidence of the respective bargaining positions in which buyer and sellers found themselves at the time the transactions were concluded. They may well be evidence of the existence of arm's-length bargaining, but arm's-length bargaining, *per se*, is not proof or reasonableness.

But the central issue presented is one of constitutional

requirements and of our statutory power. The applicants claim that the Act does not limit the Commission to the use of any particular formula or combination of formulae in determining a just and reasonable rate under section 4 (e). From that premise applicants infer that the Commission may adopt the methods used to determine an unregulated price as a regulatory formula in rate making. Having taken this step in their reasoning, the applicants point to evidence tending to show that the 17¢ rate is a "reasonable" market price. And as further support for their argument, they urge that the higher rates encourage continued exploration and development of gas supplies to the benefit both of ultimate consumers and producers.[12]

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This reasoning is faulty. It supposes that because court decisions have held the Commission is not limited to the use of any one formula or combination of formulae in determining just and reasonable rates that the Commission is completely unfettered in its choice of rate-making method. Applicants argue that in the exercise of its freedom of choice, the Commission should adopt the unregulated market as the proper guide in determining just and reasonable regulated rates. On this record it is not possible to strike a fair balance between investor and consumer interests. We cannot be sure that the rates are sufficient to promote exploration for and development of gas supplies and at the same time, to provide the protection to the ultimate consumer contemplated by the Act. Indeed, a delegation of power to make rates interpreted as broadly as applicants would have it, would permit the

[12] It is interesting to note that Bel Oil rejected offers as high as 20¢ per Mcf motivated, at least in part, by the fact that it "did not want to bear the *cost* of laying a line" to the purchaser. [Emphasis added.] (See Statement of Counsel for Bel Oil in oral argument held on June 28, 1956, Transcript of Record, pp. 900-901.)

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unregulated market to determine rates in the name of regulation. Such a result would be contrary to the clear direction of the Act that this Commission should regulate these rates. *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954).

Sections 4 and 5 of the Act set forth the end result test that rates charged by natural-gas companies shall be "just and reasonable." This is both a statutory and a constitutional requirement. *Federal Power Commission* v. *Natural Gas Pipeline Company of America*, 315 U.S. 575, 586 (1942). We think the recent decision of the Court of Appeals for the District of Columbia Circuit in *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810 (C.A.D.C., 1956), *certiorari* denied, 352 U.S. 829, is controlling here.[13] In referring the case back to the Commission for the taking of additional evidence, the Court held that in rate making the Commission must always "relate its action to the primary aim of the Act to guard the consumer against excessive rates. If the Commission contemplates increasing rates for the purpose of encouraging exploration and development, . . . it must see to it that the increase is in fact needed, and is no more than is needed, for the purpose. Further than this we think the Commission cannot go without additional authority from Congress." *Id.* at 817.

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We think it is plain from the language of the *City of Detroit* case, *supra*, that the value method used alone, as

[13] It should be remembered that our opinion No. 269, *In the Matters of Panhandle Eastern Pipe Line Company, et al.*, docket Nos. G-1116, *et al.*, issued April 15, 1954, was rendered at a time when the wholesale rates for the sale of gas by independent producers were considered not to be subject to our jurisdiction. In such a context, the economic and legal considerations impelling our action were different from those in the case now before us where all interstate wholesale rates are subject to our regulatory jurisdiction.

proposed by the applicants, is not a method of rate making open to us within our delegated power. "For, though we hold that [the conventional rate-base] method not to be the only one available under the statute, it is essential in such a case as this that it be used as a basis of comparison. It has been repeatedly used by the Commission, and repeatedly approved by the courts, as a means of arriving at lawful—'just and reasonable'—rates under the Act. Unless it is continued to be used at least as a point of departure, the whole experience under the Act is discarded and no anchor, as it were, is available by which to hold the terms 'just and reasonable' to some recognizable meaning."[14] This record contains nothing which could be used as the basis of comparison found essential by the Court.

Furthermore, we are unable to determine from use of the evidence in this record whether or not the end result, as that test is used in the *Hope* case,[15] is just and reasonable.[16] For the value method, used alone, does not provide objective standards for determining just and reasonable rates. "Of course the rate increase . . . might have a tendency to encourage . . . the development of new sources of production, as an even greater increase also might do. But the question is whether a lesser amount would suffice."[17]

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[14] 230 F. 2d 810, 818-819.

[15] *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591.

[16] Our opinion No. 279 *In the Matters of Tennessee Gas Transmission Company, Transcontinental Gas Pipe Line Corporation, et al.*, docket Nos. G-2331, G-2367, *et al.*, issued December 28, 1954, and opinion No. 280 *In the Matters of Transcontinental Gas Pipe Line Corporation*, docket Nos. G-2367 and G-4185, issued March 7, 1955, can in no way be interpreted as approval of the applicants' rates. The reasonableness of those rates was not passed upon in those proceedings which dealt with certification of facilities to Transcontinental and Tennessee Gas Transmission Company.

[17] 230 F. 2d 810, 817-818.

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The Act requires us to determine the justness and reasonableness of rate levels and structures by the use of standards not contained in the rates themselves. The Constitution extends its protection to all the independent-producing segment as well as to the pipeline segment of the natural gas industry. It is impossible to meet the requirements of either the Act or the Constitution unless

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we can determine the revenue requirements of the industry we must regulate and the effect of the rate in question on its earning capacity. The record as it now stands is deficient in terms of both the Act and the Constitution.

Based upon the foregoing analysis, and after resolving in applicants' favor all inferences and presumptions, including those on which we may exercise our discretion, we find that the applicants have failed, as a matter of law, to establish that the 17¢ rates are just and reasonable. Under these circumstances, the requirements of the Act are clear. Section 4 (e) provides that "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall upon the natural-gas company. . . ." We have held that evidence to discharge this burden must be affirmative, concrete and persuasive. *In the Matter of Mississippi River Fuel Corporation*, docket No. G-150, 2 F.P.C. 170, affirmed, 121 F. 2d 159 (C.A. 8, 1941). No burden of proof rests with interveners or the staff to present negative evidence that the increased rate is unreasonable, for until the applicants have presented a *prima facie* case opposing parties have no burden of going forward. Accordingly, the motions to dismiss made by the Public Service Commission of the State of New York, the distribution companies, and by staff counsel must be granted.

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Finally, it is apparent from the procedural statement which is set out in detail at the beginning of this opinion, that we have given the applicants ample opportunity to present any evidence which they desired us to consider. More than a year ago we ordered a resumption of hearings to give the applicants additional opportunity to present evidence sufficient to discharge their affirmative burden. At that time we stated that protection of the interests of consumers would not permit further extensions of the hearings. The interests of the consumers now require that the proceedings be terminated and that the applicants refund all amounts found not justified herein and collected subject to refund in these proceedings.

The Commission further finds:

(1) Union Oil, Louisiana Land Company, Morris Rauch, *et al.*, and Bel Oil, applicants in docket Nos. G-4331, G-4332, G-4334 and G-4505, are independent producers of natural gas, engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and each of such applicants is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas by Union Oil to Transcontinental made pursuant to the provisions of Union Oil's FPC Gas Rate Schedules Nos. 2, 3 and 4, and the supplements thereto, are sales in interstate commerce of natural gas for resale for ultimate public consumption within the meaning of the Natural Gas Act.

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(3) The sales of natural gas by Union Oil and Louisiana Land Company to Transcontinental pursuant to the provisions of their FPC Gas Rate Schedules Nos. 5 and 6, and the supplements thereto, are sales in interstate commerce

of natural gas for resale for ultimate public consumption within the meaning of the Natural Gas Act.

(4) The sale of natural gas by Morris Rauch, *et al.*, to Transcontinental pursuant to the provisions of their FPC Gas Rate Schedule No. 1, and the supplements thereto, is a sale in interstate commerce of natural gas for resale for ultimate public consumption within the meaning of the Natural Gas Act.

(5) The sale of natural gas by Bel Oil to Transcontinental pursuant to the provisions of Bel Oil's FPC Gas Rate Schedule No. 3, and the supplement thereto, is a sale in interstate commerce of natural gas for resale for ultimate public consumption within the meaning of the Natural Gas Act.

(6) The increased rates and charges embodied in Union Oil's FPC Gas Rate Schedules Nos. 2, 3 and 4, and the supplements thereto; in Union Oils and Louisiana Land Company's FPC Gas Rate Schedules Nos. 5 and 6, and the supplements thereto; in Supplement No. 1, and Supplement No. 1 to Supplement No. 1, to Morris Rauch, *et al.*, FPC Gas Rate Schedule No. 1; and in Bel Oil's FPC Gas Rate Schedule No. 3, as modified by Supplement No. 1, constitute changes in rates and charges within the meaning of Sections 4 (d) and (e) of the Natural Gas Act.

(7) Evidence of arm's-length bargaining and of market value of the gas sold by the applicants, without evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves, is not sufficient to prove the justness and reasonableness of their proposed increased rates.

(8) Our delegated rate-making authority under the Natural Gas Act does not empower us to determine just and reasonable rates on the basis of arm's-length bargaining

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and market value alone, without evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves of the applicants.

(9) Union Oil, Louisiana Land Company, Morris Rauch, *et al.*, and Bel Oil have failed to sustain the burden of proof imposed upon them under Section 4 (e) of the Natural Gas Act to show that their proposed increased rates or charges are just and reasonable.

The Commission *orders:*

(A) The motions to terminate the proceedings for lack of jurisdiction filed by Union Oil, Louisiana Land Company and Bel Oil are hereby denied.

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(B) The motions to dismiss the rate increase applications of Union Oil, Louisiana Land Company, Morris Rauch, *et al.*, and Bel Oil, in docket Nos. G-4331, G-4332, G-4334 and G-4505, made upon the record by staff counsel and the Public Service Commission of the State of New York and joined in by several distribution companies are hereby granted.

(C) The schedules of increased rates and charges referred to in paragraph (6) which went into effect on February 1, 1955 (February 2, 1955, in the case of Bel Oil), under bond or undertaking to assure refund of excess charges, are cancelled.

(D) The schedules of rates and charges contained in Union Oil's FPC Gas Rate Schedule No. 1, and the supplements thereto, in Morris Rauch, *et al.*, FPC Gas Rate Schedule No. 1, and in Bel Oil's FPC Gas Rate Schedule No. 3, which were in effect immediately prior to February 1, 1955 (February 2, 1955, in the case of Bel Oil), the oper-

ation and applicability of which have been held in abeyance (not cancelled) pending the outcome of these proceedings shall be reinstated effective as to all sales and deliveries made on and after February 1, 1955 (February 2, 1955, in the case of Bel Oil), and shall remain in force and effect until further order of the Commission.

(E) Within 45 days from the date of issuance of this order, Union Oil (on behalf of itself and Louisiana Land Company), Morris Rauch, *et al.*, and Bel Oil shall refund to Transcontinental the difference between the amounts collected from Transcontinental under bond or undertaking under the FPC Gas Rate Schedules referred to in paragraph (6) above, and the amounts which result from the application to the volumes of gas purchased during the refund period of the rates and charges, referred to in paragraph (D) above, which were in effect immediately prior to February 1, 1955 (February 2, 1955, in the case of Bel Oil), together with simple interest at the rate of 6% per annum from the respective dates of receipt of such excess amounts in the refund period to the date of refund. Union Oil, Morris Rauch, *et al.*, and Bel Oil shall bear all costs incidental to the making of such refund.

(F) Within 60 days from the date of issuance of this order, Union Oil, Morris Rauch, *et al.*, and Bel Oil shall report to the Commission in writing and under oath the details of their calculations resulting in the refunds ordered pursuant to paragraph (E) above, together with copies of releases from Transcontinental with respect to such refunds.

By the Commission. Commissioners Digby and Stueck dissenting.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

Opinion of FPC on Dismissal of Union Group Rate Increase Applications

(3068)

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In the Matters of

UNION OIL COMPANY OF CALIFORNIA	Docket No. G-4331
UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY	Docket No. G-4332
MORRIS RAUCH, et al.	Docket No. G-4334
BEL OIL CORPORATION	Docket No. G-4505

(Issued December 6, 1956)

STUECK and DIGBY, Commissioners, *dissenting:*

In dissenting, we feel that we should point out some of the broad concepts on which the majority opinion is based and which we are impelled to conclude to be erroneous. In order to make our position clear, we find it necessary to quote from the majority opinion, as follows:

> These proceedings present for our resolution the basic question whether the evidence presented by the applicants is sufficient to support a finding that the increased rates of 17¢ per Mcf are just and reasonable within the meaning of the Natural Gas Act. More precisely defined, does the Natural Gas Act permit the Commission to approve the increased rates sought to be justified here through evidence of arm's length bargaining, field prices and commodity or market value of the gas when there is no evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves;

Also, the following language used in the majority opinion:

> Based upon the foregoing analysis, and after resolving in applicants' favor all inferences and presump-

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tions, including those on which we may exercise our discretion, we find that the applicants have failed, as a matter of law, to establish that the 17¢ rates are just and reasonable. Under these circumstances, the requirements of the Act are clear. Section 4(e) provides that "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company . . . ." We have held that evidence to discharge this burden must be affirmative, concrete and persuasive. *In the Matter of Mississippi River*

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

In the Matters of	
UNION OIL COMPANY OF CALIFORNIA	Docket No. G-4331
UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY	Docket No. G-4332
MORRIS RAUCH, et al.	Docket No. G-4334
BEL OIL CORPORATION	Docket No. G-4505

Errata Notice

(January 7, 1957)

Opinion No. 300

Opinion and Order Affirming Initial Decision of Presiding Examiner

(Issued December 6, 1956)

Opinion of FPC on Dismissal of Union Group Rate Increase Applications

(3073)

Page 2, line 11:
Insert after "Since February 1, 1955"
"(February 2, 1955 in the case of Bel Oil),"

Page 15, line 7:
Insert after "February 1, 1955"
"(February 2, 1955 in the case of Bel Oil)"

Page 15, line 12:
Insert after "February 1, 1955"
"(February 2, 1955 in the case of Bel Oil)"

Page 15, line 13:
Insert after "February 1, 1955"
"(February 2, 1955 in the case of Bel Oil)"

Page 15, line 24:
Insert after "February 1, 1955"
"(February 2, 1955 in the case of Bel Oil)"

LEON M. FUQUAY
Secretary.

Memorandum to Files

Copy mailed to all person [sic] receiving a copy of the notice in the above-entitled matters.

DC-38
cc:OGC
sdp 1-7-57

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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matters of

UNION OIL COMPANY OF CALIFORNIA	Docket No. G-4331
UNION OIL COMPANY OF CALIFORNIA and THE LOUISIANA LAND AND EXPLORATION COMPANY	Docket No. G-4332
MORRIS RAUCH, *et al.*	Docket No. G-4334
BEL OIL CORPORATION	Docket No. G-4505

ORDER DENYING PETITIONS FOR REHEARING AND AMENDING ORDER ACCOMPANYING OPINION NO. 300

(Issued January 31, 1957)

By timely petitions each of the above-entitled applicants and Transcontinental Gas Pipe Line Corporation filed for rehearing of the Commission's opinion No. 300 and accompanying order issued in these proceedings on December 6, 1956.[1] Each of the petitioners also requested a stay of the

[1] The petitions for rehearing were filed by Bel Oil Corporation on January 2, 1957, by Morris Rauch, *et al.*, on January 3, 1957, by Union Oil Company of California and The Louisiana Land and Exploration Company on January 4, 1957, and by Transcontinental Gas Pipe Line Corporation on January 7, 1957. In its petition, Transcontinental incorporated by reference a major portion of the petition for rehearing filed by Union Oil. For convenience we refer hereinafter to Union Oil when speaking of Union Oil Company of California and The Louisiana Land and Exploration Company.

Commission's order. In the opinion and order we granted motions to dismiss rate increases of the independent-producer applicants which, if approved, would have changed the rates and charges to Transcontinental from 9.797 cents per Mcf to 17 cents per Mcf. In addition, we ordered refunds of the difference between the amounts collected under bond or undertaking at the 17-cent rate and the amounts which would have been collected at the 9.797-cent rate.

Each of the petitioners now requests that the Commission reopen the record in these proceedings for the purpose of permitting the independent-producer applicants to present evidence of their financial requirements and an appropriate rate base and cost of service applicable to their sales

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to Transcontinental. The petitioners give detailed explanations both as to why they did not present such evidence during the prescribed hearings and why they should be given additional opportunity to do so now. At the same time, however, they argue that evidence of costs and revenue requirements has no bearing upon the reasonableness of their rates to Transcontinental.

Among the reasons assigned for not presenting the evidence in the normal course of the proceedings, applicants point to the fact that order No. 174-B, issued on December 17, 1954, in docket Nos. R-137 and R-138 did not require independent producers to maintain their records on a cost basis in accordance with our uniform System of Accounts Prescribed for Natural Gas Companies. The purpose of order No. 174-B was to provide procedural rules of a general nature applicable to a large number of sellers of natural gas which had recently been determined to be subject to our jurisdiction under the Natural Gas Act. These procedural rules were intended to simplify the problems of

regulation suddenly thrust upon the producer segment of the industry and this Commission. In one attempt to ease the regulatory transition we relaxed the rules for independent producers, foregoing the requirement that they conform their records to the Uniform System of Accounts. But such a relaxation of procedural rules affords no basis for concluding what substantive proof would be necessary to satisfy statutory standards in a rate proceeding.

Similarly, with respect to our action terminating the proceedings in docket No. R-142 without promulgating standards to be applicable in determining the reasonableness of rates of independent producers, no interpretation that cost evidence would not be considered necessary is warranted.

Petitioners also point to various stages in these proceedings when we might have prescribed standards to be followed. But pursuant to Section 4 of the Act, it is the affirmative duty of the natural-gas company to take the initiative in filing just and reasonable rates. *Pennsylvania Water & Power Company* v. *Consolidated,* 184 F. 2d 552, 567 (CA 4, 1950), *certiorari* denied, 340 U.S. 906. It is our province to review the rates filed by natural-gas companies. *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation,* 350 U.S. 332, 341 (1956). We granted extensive continuances to the applicants on representations that the additional time was required to prepare the necessary evidence. At the initial hearings, the applicants sought to justify their increases with evidence designed to satisfy criteria presumably used to establish the previously unregulated rate.[2] Upon consideration of motions to

[2] Since the 17-cent rates of Union Oil were negotiated in November 1953, prior to determination of our jurisdiction in *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 672 (1954), these rates were, in effect, unregulated rates. The increases to Bel Oil and Morris Rauch, *et al.,* apparently were based upon the increases to Union Oil.

dismiss, we unmistakably indicated that such evidence was not sufficient to sustain the burden of proof to show the reasonableness of the increased rates and we remanded the matter for further hearing to provide opportunity for the introduction of other additional evidence. We held in our order issued October 24, 1955, in these proceedings:

> "The applicants here attempt to support their proposed increases on the grounds that they resulted from renegotiation of a contract between non-affiliates at arm's length and claim that the new contract price did not then and does not now exceed the reasonable market price or current field price for the sale of natural gas in the pricing area. But the evidence which they have submitted in support of these contentions does not convince us that the proposed increased rate is just and reasonable.
>
> "The contract with Transco upon which applicants rely is subject to modification as to rates because the applicants are subject to the Natural Gas Act. The fact that contracts have been entered into in good faith and in arm's-length-bargaining does not make them immune from the regulation in the public interest prescribed by Congress, nor are producer contract terms *per se* an indication that the prices agreed upon are just and reasonable either initially or as subsequently increased pursuant to escalation clauses or otherwise. (See *Colorado Interstate Gas Co.* v. *F.P.C.*, 142 F.2d 943, 953 (C.A. 10, 1944), *aff.* 342 U.S. 581; *Mississippi River Fuel Corp.* v. *F.P.C.*, 122 F.2d 159, 163 (C.A. 8, 1941).)"

Evidence presented upon remand of the proceedings to the presiding examiner did not cure the initial record de-

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ficiencies. The presiding examiner found that the evidence presented at reopening of the proceedings was no more than an attempt to persuade the Commission that the evidence initially presented was sufficient. We agree with this finding and we are not persuaded.

It is our duty in regulation under the Act to give consideration to the interests of ultimate consumers as well as to the natural-gas companies which we regulate. When we issued opinion No. 300, we were, of course, fully aware of the applicants' position stated at the second oral argument that they were ready to proceed with an effort to supply any evidence which the Commission might find necessary. We also gave careful consideration to the position of our colleagues who dissented. No new facts or circumstances have been shown to exists [sic] or have arisen since the issuance of opinion No. 300 which warrant reopening of these proceedings. We feel that the primary aim of the Act, protection of the ultimate consumers, would not be served if we were to prolong these proceedings further.

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In support of their argument to reopen the proceedings, petitioners contend that opinion No. 300 was the first instance in which elements of proof in an independent-producer rate case had been discussed. Further, they claim that the rationale of the *Panhandle* and *El Paso* cases,[3] in which the Commission departed from the traditional rate-base method in regulating production activities of interstate pipeline companies is applicable here. This, in effect, constitutes an attack upon the appli-

[3] *In the Matters of Panhandle Eastern Pipe Line Company*, docket Nos. G-1116, *et al.*, opinion No. 269, issued April 15, 1954; and *In the Matter of El Paso Natural Gas Company*, docket No. G-2018, opinion No. 278, issued November 26, 1954.

cability of *City of Detroit* v. *Federal Power Commission*, 230 F.2d 810 (CADC, 1955), which we have held to be controlling in our determination. Notably, the *City of Detroit* case does not require that we adhere to the traditional rate-base method in regulating rates of natural-gas companies under Section 4. What it does require is the presentation of rate base and the cost evidence as a point of departure plus showing that any additional allowance is no more than is reasonably necessary for the purposes advanced for any increase. *Id.* 817-819. Because the record here does not contain this basic evidence found essential by the court, we cannot prescribe any standards here which might be used to determine what additional allowance, if any, is reasonably necessary.

Significantly, in the *City of Detroit* case, the court was interpreting the substantive statutory and constitutional standards which we must follow. These are applicable to the rates of all natural-gas companies whether they be interstate transmission companies or independent producers. We carefully considered the applicants' contentions with respect to the *City of Detroit* case before we issued our opinion No. 300 and could find no legal basis for excluding independent producers from the application of the law of that case. Further, this conclusion is consistent with the effect of the decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672 (1954).

It is asserted by Union Oil that the *City of Detroit* case amounts to a change in the law since these proceedings were commenced.[4] We can see no change in the law since

[4] We note, however, that Union Oil later makes a contrary assertion with respect to our jurisdiction as delineated by *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954), stating that it has been held again and again that court decisions do not change but merely declare the law. (Union Oil Petition for Rehearing, pp. 32-33).

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the conclusion of the hearings herein on March 14, 1956. Petitioners' difficulty stems from the fact that there has *not* been

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a change. The *City of Detroit* opinion is precisely the same now as it was on December 15, 1955, when it was issued by the Court. We cannot change it. If we have misinterpreted the law as declared by the Court of Appeals, petitioners can obtain redress in court; and this remedy is available without reopening these proceedings for the taking of additional evidence.

Additionally, in their petitions for rehearing, petitioners reaffirm their reliance upon the *Mobile* case, *supra*, as support for the proposition that the Commission did not have jurisdiction to review their rate increases under Section 4. It is urged by Union and Bel Oil that the Commission should permit the filing of the increased rates as initial filings subject to review only under Section 5 because they were negotiated prior to June 7, 1954. Morris Rauch, *et al*, claim that the inclusion of the two-party favored-nation provision in their contract with Transcontinental contemplates the increase as part of the contract. Neither argument contradicts the fact that the 17-cent rates would change the rates of 9.797 cents per Mcf which were in effect as of June 7, 1954. That the increases may have been negotiated prior to June 7, 1954, or that another contract negotiated prior to that date may have contemplated unknown and uncertain increases is immaterial.

Section 4 (c) of the Act provides that "Under such rules and regulations as the Commission may prescribe," every natural-gas company shall file schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission. Pursuant to Sections 4 and 16 of the Act, the Commission issued sec-

tion 154.94 of its Regulations. This section of the Regulations, requires that "No change shall be made in any rate, charge, or service in effect on or after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, without first filing a change in rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section."[5]

Further, a change in rate is defined to include "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954. . . ."[6]

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We have re-examined the contentions that the evidence presented at the hearing shows that at least 17 cents per Mcf is needed to encourage exploration for and production of gas supplies. The evidence tends to show what rates would be paid in the southern Louisiana area in the absence of regulation. Evidence of a general nature applicable to exploration and production on a nation-wide basis indicates that reserves are not increasing as rapidly as production, that it takes a greater number of exploratory wells each year to add substantial reserves, and that producers have been forced to drill deeper wells in less accessible places in their search for gas. We conclude again, as we did in opinion No. 300, after consideration

[5] Section 154.94 (a), 15 CFR 154.94. (a).

[6] Section 154.94 (e), 15 CFR 154.94 (e). Similar provisions have long been provided in the Commission's Regulations governing changes in rates of natural-gas transmission companies. See *e.g.*, section 154.38 (d) (3).

of this and all the other evidence presented in these proceedings, that it is not possible on this record to strike a fair balance between investor and consumer interests. Employment of rate-making standards as broad as applicants would have us use would permit the unregulated market to determine rates in the name of regulation. Such a result would be contrary to the clear direction of the Act that this Commission should regulate these rates. *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954).

In its petition for rehearing Union Oil also attacks both the validity of order No. 174-B and its application in these proceedings.[7] It should be made clear here, as it was in the opinion of the Court of Appeals for the Fifth Circuit in *Union Oil Company of California and The Louisiana Land and Exploration Company* v. *Federal Power Commission*, 236 F. 2d 816 (CA 5, 1956), *certiorari* denied, January 14, 1957, No. 579, October Term, 1956, —— U.S. ——, that "The order [No. 174-B] does not change the petitioners' existing or future status or condition since it is not an adjudication that any particular natural-gas producer is a 'natural-gas company' or an 'independent producer'. . . . If [they are] person whose sales of natural gas are such as to bring them within the Commission's jurisdiction, 'this circumstance arises by reason of the Natural Gas Act itself and not by virtue of the order in question.". *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785, 791 (CA 5, 1956). The Court of Appeals dismissed Union Oil's petition for review on grounds that order No. 174-A and the interlocutory sus-

[7] Although Union Oil's allegations of error are made variously in terms of order No. 174-A and order No. 174-B or the 174 series of orders, our discussion herein is in terms of order No. 174-B since order No. 174-B has superseded order Nos. 174 and 174-A and is the presently effective order.

pension order in these proceedings were not then judicially reviewable under Section 19(b).

It should also be made clear that the jurisdictional status of the sales over which we exercise our rate reviewing authority in these proceedings has been previously determined. *In the Matters of Union Oil Company of California, et al.*, docket No. G-3711, certificate issued October 13, 1955;

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In the Matter of Morris Rauch, et al. docket No. G-3791, certificate issued July 12, 1955; and *In the Matter of Bel Oil Corporation*, docket No. G-2796, certificate issued December 13, 1954. No court review of these orders was sought.

Union Oil's allegations of invalidity of order No. 174-B for lack of proper notice and hearing are without substance. Order No. 174-B promulgated only procedural rules of general applicability. It was adopted pursuant to authority of Sections 4, 7 and 16 of the Act, which sections do not require notice and hearing prior to the adoption and issuance of regulations thereunder. No hearing was required under the Administrative Procedure Act. (Act of June 11, 1946, Section 4, 60 Stat. 237, 238-239, 5 U.S.C. 1001, 1003). *Willapoint Oysters Inc.* v. *Ewing*, 174 F. 2d 676, 694 (CA9), *certiorari denied*, 338 U.S. 860.

With respect to the application of order No. 174-B to these proceedings, Union Oil erroneously contends that by issuing the order the Commission exceeded its jurisdiction by depriving it of its "statutory right to make an initial filing of their rates which would not be subject to suspension without hearing." By statutory obligations imposed by Sections 7 (c) and 4 (c) of the Act, Union Oil should have obtained certificates authorizing the sales to Transcontinental and have filed schedules of rates with

the Commission prior to the initial delivery to Transcontinental. Such activities were from their inception covered by the Act, and certainly from June 7, 1954, the date of the *Phillips* decision, *supra*, these petitioners knew their activities were subject to the provisions of the Act. The rates Union Oil and other independent producer applicants, in these proceedings were charging on June 7, 1954, were the rates they were required to file with the Commission. Such rates could not validly be changed except in accordance with Section 4 of the Act.[8] Order No. 174-B relaxed the more stringent provisions generally applicable at this time, to natural-gas companies subject to the Act, but it did not deprive Union Oil of the right to file its initial rate.

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accept Union Oil's 17-cent rate as an initial filing not subject to suspension, we would be required to declare the Act ineffective as to those sales prior to December 1, 1954. We are powerless to grant such an exemption. The effective rate on June 7, 1954, was 9.797 cents per Mcf, and such rate can be changed only in the manner prescribed by the Act. As we held above, the fact that the

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[8] Strictly interpreted, Union Oil should have filed its rate schedules effective as to sales to Transcontinental before initial delivery under the 1948 contract and should have filed a change in rate pursuant to Section 4 (d) upon the occasion of the increase of 1.37 cents per Mcf resulting from operation of a favored-nations provision in the contract prior to June 7, 1954. The rate of 9.797 cents per Mcf in effect on June 7, 1954, was not an initial rate although under order No. 174-B we accept it as an initial filing. But, at the same time, if these petitioners do not care to take advantage of order No. 174-B they must then comply with the regulations in effect as to all "natural-gas companies" prior to June 7, 1954, and continuously since then. Section 154.62 of those regulations requires the filing of initial rates in tariff form and section 154.63 requires rate changes to be filed in a particular manner. Independent producers are relieved of these requirements by the order No. 174-B, but we offer no objection to any natural gas company, such as those here concerned, meeting the more stringent requirements.

increased rates may have been negotiated prior to June 7, 1954, is immaterial.

Finally, it is clear that the application of order No. 174-B to these proceedings has no retroactive rate-making effect. No rates are retroactively prescribed. The effective rate as of June 7, 1954, is permitted to continue as the effective rate. The only retroactive effect of order No. 174-B is to make available to independent producers as of June 7, 1954, general regulations less onerous than those which would otherwise have to be satisfied in complying with statutory requirements.

By an order issued January 16, 1957, in these proceedings, we stayed the operation of the order accompanying opinion No. 300 pending further order of the Commission. The purpose of the stay was to enable all parties to exhaust their administrative remedies with this Commission before being required to distribute refunds. We find it appropriate that the time fixed for compliance with the several requirements of the order in these proceedings should be modified as hereinafter ordered. We also find that further stay of the order as so modified is not justified or appropriate. Accordingly, the stay heretofore granted by order issued January 16, 1957, will be terminated as of the date of issuance of this order.

One further matter remains for clarification. In paragraph (C) in the order accompanying opinion No. 300, we provided that the "schedules of increased rates and charges referred to in paragraph (6) which went into effect on February 1, 1955, (February 2, 1955 in the case of Bel Oil), under bond or undertaking to assure refund of excess charges are cancelled." Paragraph (6) identified the "increased rates and charges embodied in" the applicants' rate schedules as "changes in rates and charges within the meaning of Sections 4 (d) and (e) of the Natural Gas Act." In order that there may be no question as to

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our meaning we wish to make it clear that paragraph (C), quoted above, disallowed only the increased rates and charges but left unaffected all other provisions of the several rate schedules and supplements described in said paragraph (6) of the order. To eliminate any possible ambiguity we herein revise paragraphs (C) and (D) of the order accompanying opinion No. 300 as hereinafter provided.

The Commission further finds:

The petitions for rehearing of our opinion No. 300 and accompanying order issued December 6, 1956, set forth no new facts and no principles of law which either were not fully considered by the Commission when it adopted the opinion and order or which, now having been considered, warrant any

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change in or modification of such opinion and order other than those set forth herein. All contentions and objections not specifically discussed herein have been considered and found either without basis in law or support in fact but are not sufficiently terial to warrant individual treatment or have been adequately disposed of otherwise.

The Commission orders:

(A) Paragraph (C), (D), (E) and (F) of the order accompanying opinion No. 300 are amended to read as follows:

> (C) The increased rates and charges embodied in the rate schedules and supplements thereto referred to in paragraph (6) above, which went into effect on February 1, 1955 (February 2, 1955, in the case of Bel Oil), under bond or undertaking to assure refund of excess charges are disallowed.

(D) The rates and charges contained in Union Oil's FPC Gas Rate Schedule No. 1, and the supplements thereto, in Morris Rauch, *et al.*, FPC Gas Rate Schedule No. 1, and in Bel Oil's FPC Gas Rate Schedule No. 3, which were in effect immediately prior to February 1, 1955 (February 2, 1955 in the case of Bel Oil), the operation and applicability of which have been held in abeyance (not cancelled) pending the outcome of these proceedings shall be reinstated effective as to all sales and deliveries made on and after February 1, 1955 (February 2, 1955 in the case of Bel Oil), and such rates and charges, as well as all presently effective provisions of the rate schedules and supplements thereto referred to in paragraph (6) above—except the increased rates and charges hereby disallowed—shall remain and continue in full force and effect until further order of the Commission, or until changed in accordance with the Natural Gas Act.

(E) Within 70 days from the date of issuance of this order, Union Oil (on behalf of itself and The Louisiana Land and Exploration Company), Morris Rauch, *et al.*, and Bel Oil shall refund to Transcontinental the difference between (a) the amounts collected from Transcontinental under bond or undertaking under the FPC Gas Rate Schedules and supplements thereto referred to in paragraph (6) above, and (b) the amounts which result from the application to the volumes of gas purchased during the refund period of the rates and charges contained in the rate schedules and supplements referred to in paragraph (D) above, which were in effect immediately prior to February 1, 1955 (February 2, 1955 in the case of Bel Oil), computed in accordance with the provisions of the rate schedules and supplements thereto referred to in paragraph (6) above, together with

simple interest at the rate of 6% per annum from the respective dates of receipt by Union Oil, Morris Rauch, *et al.*, and Bel Oil of such excess amounts in the refund period to the date of refund. Union Oil, Morris Branch [sic], *et al.*, and Bel Oil shall bear all costs incidental to the making of such refund.

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(F) Within 90 days from the date of issuance of this order, Union Oil, Morris Rauch, *et al.*, and Bel Oil shall report to the Commission in writing and under oath the details of their calculations resulting in the refunds made pursuant to paragraph (C) above, together with copies of releases from Transcontinental with respect to each of such refunds.

(B) The petitions for rehearing of our opinion No. 300 and accompanying order issued December 6, 1956, filed in these proceedings by Bel Oil Corporation on January 2, 1957, by Morris Rauch, *et al.*, on January 3, 1957, by Union Oil Company of California and The Louisiana Land and Exploration Company on January 4, 1957, and by Transcontinental Gas Pipe Line Corporation on January 7, 1957, are each hereby denied.

(C) The stay of the operation of the order accompanying opinion No. 300 granted by the order issued herein on January 16, 1957, is hereby terminated.

By the Commission. Commissioners Digby and Stueck dissenting for the reasons set out in their dissenting opinion to the Commission's opinion No. 300 and accompanying order issued December 6, 1956.

LEON M. FUQUAY
Secretary

Order of FPC Modifying Order Dismissing Union Group Rate Increase Applications

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn J. Digby, Frederick Stueck and William R. Connole.

In the Matters of

UNION OIL COMPANY OF CALIFORNIA — Docket No. G-4331

UNION OIL COMPANY OF CALIFORNIA and THE LOUISIANA LAND AND EXPLORATION COMPANY — Docket No. G-4332

MORRIS RAUCH, *et al.* — Docket No. G-4334

BEL OIL CORPORATION — Docket No. G-4505

ORDER MODIFYING ORDER DENYING PETITIONS FOR REHEARING AND AMENDING ORDER ACCOMPANYING OPINION No. 300

(Issued February 8, 1957)

In our order denying petitions for rehearing in these proceedings issued on January 31, 1957, we terminated the stay of our order accompanying opinion No. 300. We noted that we had granted the stay to enable all parties to exhaust their administrative remedies before being required to distribute refunds, and we extended the time for filing of refunds to 70 days from the date of issuance of the order denying rehearing.

The Commission finds:

It is appropriate in the public interest that the order denying petitions for rehearing and amending order accompanying opinion No. 300, issued January 31, 1957, should be modified as hereinafter ordered.

Order of FPC Modifying Order Dismissing Union Group Rate Increase Applications

(3177)

The Commission orders:

(A) The following paragraph is hereby substituted in lieu of third paragraph on page 8 of the mimeographed order issued in these proceedings on January 31, 1957:

> By an order issued January 16, 1957, in these proceedings, we stayed the operation of the order accompanying opinion No. 300 pending further order of the Commission. The purpose of the stay was to enable all parties to exhaust their administrative remedies with

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> this Commission before being required to distribute refunds, we find it appropriate that the time fixed for compliance with the several requirements of the order in these proceedings should be modified and the stay heretofore granted by order issued January 16, 1957 should be continued in effect as hereinafter ordered.

(B) The following is hereby substituted in lieu of paragraph (C) on page 10 of the mimeographed order issued in these proceedings on January 31, 1957.

> (C) The stay of the order accompanying opinion No. 300 granted by order issued herein on January 16, 1957, shall be continued in full force and effect for a period of 60 days from the date of issuance of this order, *provided, however,* if judicial review of our action should be sought and a stay requested from the court, this stay shall continue in full force and effect until the court takes action upon the request for stay of the Commission's order in this proceeding.

By the Commission.

J. H. GUTRIDE
J. H. Gutride
Secretary.

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Opinion of FPC on Dismissal of Sun Group Rate Increase Applications

(9380)

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Issued February 6, 1957

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matters of	
Sun Oil Company	Docket No. G-8288
E. J. Hudson, et al.	Docket No. G-4335
Maracaibo Oil Exploration Corporation	Docket No. G-6279
Sohio Petroleum Company	Docket No. G-8488

FINDINGS AND ORDER AFFIRMING INITIAL DECISION GRANTING MOTION TO DISMISS RATE INCREASE PROCEEDINGS, ORDERING REFUNDS AND DENYING MOTION FOR ORAL ARGUMENT.

These are rate proceedings arising under Sections 4 and 15 of the Natural Gas Act. They involve increased rates and charges for natural gas produced from the Egan Field in southern Louisiana by the above-entitled applicants and sold to Transcontinental Gas Pipe Line Corporation. Pursuant to a basic contract negotiated in 1948 and amended from time to time thereafter, the rate charged by each of the applicants to Transcontinental on June 7, 1954, was 9.797 cents per Mcf. The increases filed by the applicants would raise their rates to 17 cents per Mcf.[1] The over-all effect of increased rates in the four dockets would be to increase the charges to Transcontinental by approximately $536,000, annually.

These proceedings are companion to those *In Matters of*

[1] The rates include reimbursement for a Louisiana state gathering tax of one cent per Mcf. Throughout this order reference made to rates includes the one cent per Mcf gathering tax reimbursement.

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Union Oil Company of California, et al., docket Nos. G-4331, *et al.*, opinion No. 300, issued December 6, 1956. Both consolidated proceedings involve sales of natural gas produced in southern Louisiana and sold to Transcontinental. Both involve increases from 9.797 cents per Mcf to 17 cents per Mcf. And, like the increases sought by Morris Rauch, *et al.* and Bell [sic] Oil Corporation in the Union Oil proceedings, *supra*, the increases sought by the applicants here are based upon the fact that Transcontinental agreed to pay 17 cents per Mcf to other producers in the area. In fact, the increases filed by E. J. Hudson, *et al.* (Hudson) in docket No. G-4335 and Maracaibo Oil Exploration Corporation (Maracaibo) in docket No. G-6279, resulted from the operation of two-party favored-nation clauses triggered by

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Transcontinental's agreement to increase its payment to Union Oil from 9.797 cents per Mcf, which increase we disallowed in the order accompanying opinion No. 300 in docket Nos. G-4331, *et al.*

By appropriate orders we suspended the effectiveness of the increased rates filed by the applicants and later orders permitted the increased rates to go into effect subject to refund. Hearings were held in the consolidated proceedings on September 12, 1955, through September 16, 1955, when applicants completed presentation of their case-in-chief.[2] Upon consideration of a motion to dismiss made by staff counsel, we remanded the proceedings to the presiding examiner by order issued October 24, 1954, to give the applicants additional opportunity to present evidence sufficient to satisfy the burden of proof imposed upon them by Section 4(e) of the Act. After presentation of further evidence by the applicants, staff counsel renewed.

[2] Evidence was presented by Sun Oil Company and Sohio Petroleum Company and adopted by Hudson and Maracaibo.

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the motion to dismiss. We directed the presiding examiner to rule upon the motion in his initial decision in the proceedings.

After the close of the hearings each of the applicants filed a motion to vacate the suspension orders and to dismiss the proceedings. These motions, like similar motions to terminate the proceedings for lack of jurisdiction in the *Union* case, *supra*, are based upon an interpretation that the decisions in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956) and *Federal Power Commission* v. *Siera* [sic] *Pacific Power Company*, 350 U.S. 348 (1956) prohibit our review of these rate increases under Section 4 of the Act.

The presiding examiner issued his initial decision on September 11, 1956, in which he denied the motions to vacate and dismiss filed by the applicants and granted the motion to dismiss filed by staff counsel. The proceedings are now before us on exceptions to the presiding examiner's decision.

In their exceptions the applicants raise two basic issues: (1) Are the increased rates filed by each applicant subject to Commission review under Section 4 of the Act and (2) Does the evidence presented by the applicants satisfy the burden of proof imposed upon the applicants by Section 4 (e) to show that the increased rates are just and reasonable.

There can be no doubt that the increased rates of the applicants in these proceedings are subject to the filing and review provisions of Section 4 of the Act. Contrary to the applicants' contentions, the *Mobile* and *Sierra Pacific* cases directly support our review under Section 4 (e).

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In the *Mobile* and *Sierra Pacific* cases, the Court condemned unilateral filings but interpreted Section 4 to require the filing, notice, and Commission review of changes in any

"rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto" which would be "otherwise valid." The changes in rates proposed by United Gas Pipe Line Company in the *Mobile* case and Pacific Gas and Electric Company in the *Sierra Pacific* case were not "otherwise valid." In these proceedings, however, both the applicants, as sellers, and Transcontinental, as buyer, have agreed to the changes in rate and the changes are "otherwise valid." It is our duty under Section 4 to review these changed rates agreed to between the parties to determine whether they conform to the standards laid down in the Act.

The applicants' contention that the increased rates do not constitute "changes" within the meaning of Section 4 of the Act is erroneous. The facts are clear that the 17-cent rates would change the rates of 9.797 cents per Mcf which were in effect as of June 7, 1954, and prior to the dates when the respective increases were put into effect. It is immaterial that contracts negotiated prior to June 7, 1954, may have contained favored-nation provisions contemplating unknown and uncertain future changes.

Section 4 (c) of the Act provides that "Under such rules and regulations as the Commission may prescribe," every natural-gas company shall file schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission. Pursuant to Sections 4 and 16 of the Act, the Commission issued Section 154.94 of its Regulations. This section of the Regulations require that "No change shall be made in any rate, charge, or service in effect on or after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.94 hereof, without first filing a change in

rates pursuant to Section 4 (d) of the Natural Gas Act and in accordance with this section."[3]

Further, a change in rate is defined to include "The operation of any provision of the rate schedule providing for future or periodic changes in the rate, charge, classification, or service after June 7, 1954, or the operation of any like provision in any initial rate schedule filed after June 7, 1954. . . ."[4]

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Upon complete review of the evidence presented we find that in all essential respects these proceedings are substantially similar to the proceedings *In the Matters of Union Oil Company of California, et al.*, docket Nos. G-4331, *et al.*, and that the rationale of that decision controls the result reached here. For this reason we find it unnecessary to hear oral argument as requested by Sun Oil Company and Sohio Petroleum Company by a joint motion filed on October 22, 1956.

To prove the reasonableness of the increased rates, the applicants presented evidence of arm's-length bargaining between the parties and of comparable or market prices in the "contract area" in southern Louisiana. In addition, applicants presented general data on a nation-wide basis, including evidence of the concentration of ownership of gas reserves in the United States, the principal uses of natural gas, the principal sources of energy supply, the average value of competitive fuels at points of production, residential fuel costs, and the ratio of proved reserves of natral gas to net production. Significantly, there is no showing on

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[3] Section 154.94 (a), 15 CFR 154.94 (a).

[4] Section 154.94 (c), 15 CFR 154.94 (c). Similar provisions have long been provided in the Commission's regulations governing changes in rates of natural-gas transmission companies. See, *e.g.*, Section 154.38 (d) (3), 15 CFR 154.38 (d) (3).

(9384)

the record either of revenue requirements or that the increased rates are no higher than necessary to promote exploration for and development of gas supplies while, at the same time, providing protection to the ultimate consumer contemplated by the Act. *In the Matters of Union Oil Company of California, et al., supra.*

We have been directed always to relate our action in reviewing the reasonableness of rates to the primary aim of the Act to guard the consumer against excessive rates. If we contemplate increasing rates for the purpose of encouraging exploration and development of gas supplies, we must be sure that the increase is needed, and is no more than is needed, for the purpose. Further than this we cannot go without additional authority from Congress. *City of Detroit* v. *Federal Power Commission,* 230 F. 2d 810, 817 (1955). And, to determine that the increase is needed, it is essential that the conventional rate-based method of rate-making be used at least as a basis of comparison or point of departure. This record does not contain the evidence found essential by the Court.[5] Employment of rate-making standards as broad as the applicants would have us use would permit the unregulated market to determine rates in the name of regulation. Such a result would be contrary to the clear direction of the Act that this Commission should regulate these rates. *Phillips Petroleum Company v. Wisconsin,* 347 U.S. 672 (1954).

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The Public Service Commission of the State of New York, The Brooklyn Union Gas Company and Long Island Light-

[5] The presiding examiner excluded the testimony of a witness, an employee of Transcontinental, intended to show that he considered the 17 cent rate a reasonable one. We overrule the presiding examiner and admit the excluded testimony. However, this testimony in no way meets the requirements of the *City of Detroit* and *Union* cases, *supra,* which we hold controlling here.

ing Company, interveners in these proceedings, except to the initial decision of the presiding examiner on the ground that no refunds were ordered. We find that protection of the interests of consumers requires that applicants refund all amounts found not justified and collected under bond or undertaking in these proceedings and that, upon completion of the refunding of such amounts to the satisfaction of this Commission in compliance with this order, the proceedings should be terminated.

The Commission further finds:

(1) Each of the applicants in these proceedings is an independent producer of natural gas engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and each is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act. Commission jurisdiction over the sales of each applicant involved in these proceedings has been previously determined, certificates of public convenience and necessity have been issued authorizing the sales and the certificates have been accepted in the following proceedings by each applicant: *In the Matter of Sun Oil Company*, docket No. G-6838, order issued February 2, 1956; *In the Matter of E. J. Hudson, et al.*, docket No. G-3667, order issued March 21, 1955; *In the Matter of Maracaibo Oil Exploration Corporation*, docket No. G-3198, order issued July 5, 1955; and *In the Matter of Sohio Petroleum Company*, docket No. G-5928, order issued February 6, 1956.

(2) The increased rates and charges embodied in Supplement No. 17 and Supplement No. 1 to Supplement No. 17 to Sun Oil Company's FPC Gas Rate Schedule No. 44, in Supplement No. 7 to Hudson's FPC Gas Rate Schedule No. 3, in Supplement No. 13 to Maracaibo's FPC Gas Rate Schedule No. 1 and in Supplement No. 18 and Supplement

No. 1 to Supplement No. 18 of Sohio Petroleum Company's FPC Gas Rate Schedule No. 26, constitute changes in rates and charges within the meaning of the Natural Gas Act.

(3) Evidence of arm's-length bargaining and of market value of the gas sold by the applicants, without evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves, is not sufficient to prove the justness and reasonableness of the increased rates.

(4) Our delegated rate-making authority under the Natural Gas Act does not empower us to determine just and reasonable rates on the basis of arm's-length bargaining and market value alone, without evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves of the applicants.

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(5) The applicants have failed to sustain the burden of proof imposed upon them under Section 4 (e) of the Natural Gas Act to show that their increased rates and charges are just and reasonable.

(6) Subject to the modifications set forth in this order, the initial decision of the presiding examiner issued in these proceedings on September 11, 1956, should be affirmed.

The Commission orders:

(A) The increased rates and charges embodied in the rate schedules and supplements thereto referred to in paragraph (2) above, which went into effect under bond or undertaking to assure refund of excess charges are hereby disallowed.

(B) The rates and charges contained in Sun Oil Company's FPC Gas Rate Schedule No. 44 and supplements

thereto, in Hudson's FPC Gas Rate Schedule No. 3 and Supplements thereto, in Maracaibo's FPC Gas Rate Schedule No. 1 and supplements thereto, and in Sohio Petroleum Company's FPC Gas Rate Schedule No. 26 and supplements thereto which were in effect immediately prior to February 1, 1955, in the case of Hudson and Maracaibo, March 1, 1955, in the case of Sun Oil Company, and March 20, 1955, in the case of Sohio Petroleum Company, the operation and applicability of which have been held in abeyance (not cancelled) pending the outcome of these proceedings, shall be reinstated effective as to all sales and deliveries made on and after February 1, 1955, March 1, 1955, and March 20, 1955, in the respective dockets; and such rates and charges, as well as all presently effective provisions of the rate schedules and supplements thereto referred to in paragraph (2) above—except the increased rates and charges herein disallowed—shall remain and continue in full force and effect until further order of the Commission or until changed in accordance with the Natural Gas Act.

(C) Within 70 days from the date of issuance of this order, Sun Oil Company, Hudson, Maracaibo, and Sohio Petroleum Company shall refund to Transcontinental the difference between (a) the amounts collected from Transcontinental under bond or undertaking under the rate schedules and supplements thereto referred to in paragraph (2) above, and (2) the amounts which result from the application of the volumes of gas purchased during the refund periods at the rates and charges contained in the rate schedules and supplements thereto referred to in paragraph (B) above, computed in accordance with the provisions of the rate schedules and supplements thereto referred to in paragraph (2) above, together with simple interest at the rate of 6% per annum from the respective dates of receipt by each applicant of such excess amounts to the date of refund.

Opinion of FPC on Dismissal of Sun Group Rate Increase Applications

(9386)

Sun Oil Company, Hudson, Maracaibo and Sohio Petroleum Company shall bear all costs incidental to making such refunds.

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(D) Within 90 days from the date of issuance of this order, Sun Oil Company, Hudson, Maracaibo and Sohio Petroleum Company shall report to the Commission in writing and under oath the details of their calculations resulting in the refunds made pursuant to paragraph (C) above, together with copies of releases from Transcontinental with respect to each of such refunds.

(E) Subject to the modification as set forth herein the initial decision of the presiding examiner issued on September 11, 1956, in these proceedings is hereby affirmed and the motion to dismiss the rate increase applications filed by staff counsel for failure on the part of the applicants to sustain the burden of proof under Section 4 (e) of the Act is hereby granted.

(F) The joint motion for oral argument filed by Sun Oil Company and Sohio Petroleum Company on October 22, 1956, is hereby denied.

(G) Upon completion of the refunds to the satisfaction of the Commission as ordered in paragraph (C) above, and the reporting pursuant to paragraph (D) above, the proceedings herein shall be terminated.

By the commission.

Commissioners Digby and Stueck dissenting.

J. H. Gutride,
Secretary.

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In the Matters of

Sun Oil Company	Docket No. G-8288
E. J. Hudson, et al.	Docket No. G-4335
Maracaibo Oil Exploration Corporation	Docket No. G-6279
Sohio Petroleum Company	Docket No. G-8488

DIGBY AND STUECK, Commissioners, *dissenting:*

We dissent from the majority in this case for reasons set forth in our dissent to Opinion No. 300, Union Oil Company of California, *et al.* Docket No. G-4331, *et al.;* and attach hereto a copy of that dissenting opinion which is adopted as our dissent on all relevant issues in this proceeding.

SEABORN L. DIGBY,
Commissioner.

FREDERICK STUECK,
Commissioner.

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In the matters of

Union Oil Company of California	Docket No. G-4331
Union Oil Company of California and Louisiana Land and Exploration Co.	Docket No. G-4332
Morris Rauch, et al.	Docket No. G-4334
Bel Oil Corporation	Docket No. G-4505

(Issued December 6, 1956)

STUECK AND DIGBY, Commissioners, *dissenting:*

In dissenting, we feel that we should point out some of the broad concepts on which the majority opinion is based and which we are impelled to conclude to be erroneous. In

order to make our position clear, we find it necessary to quote from the majority opinion, as follows:

These proceedings present for our resolution the basic question whether the evidence presented by the applicants is sufficient to support a finding that the increased rates of 17c per Mcf are just and reasonable within the meaning of the Natural Gas Act. More precisely defined, does the Natural Gas Act permit the Commission to approve the increased rates sought to be justified here through evidence of arm's-length bargaining, field prices and commodity or market value of the gas when there is no evidence that the increased rates are no higher than necessary to encourage exploration for and production of known and future gas reserves.

Also, the following language used in the majority opinion:

Based upon the foregoing analysis, and after resolving in applicants' favor all inferences and presumptions, including those on which we may exercise our discretion, we find that the applicants have failed, as a matter of law, to establish that the 17c rates are just and reasonable. Under these circumstances, the requirements of the Act are clear. Section 4(e) provides that "At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company. . . ." We have held that evidence to discharge this burden must be affirmative, concrete and persuasive. *In the Matter of Mississippi River*

Fuel Corporation, Docket No. G-150, 2 F.P.C. 170, affirmed, 121 F. 2d 159 (C.A. 8, 1951). No burden of proof rests with interveners or the staff to present negative evidence that the increased rate is unreasonable for until the applicants have presented a *prima facie* case opposing parties have no burden of going forward. Accordingly, the motions to dismiss made by the Public Service Commission of the State of New York, the distribution companies, and by staff counsel must be granted.

From these statements in the majority opinion, it is clear that the majority considered the primary issue the question of whether or not the applicants in this proceeding had discharged their burden of proof in their attempt to justify a 17c per Mcf rate. Having reached the conclusion that the applicants had not justified the increased price of 17c per Mcf, the majority felt that it was right and proper to sustain the motions to dismiss and leave the applicants to collect the original rate specified in their contract dated November 17, 1953, and in the case of Bel Oil, May 27, 1954, or the price which was being collected on June 7, 1954.

We believe that the Commission's responsibility under Section 4 of the Natural Gas Act in a rate proceeding such as this is to find and determine a lawful rate and that this lawful rate might be anything not greater than the rate requested in the applicant's filing. The only control over the Commission's authority in determining the lawful rate is the injunction that the rate shall not be greater than that requested by the applicants. We take the position that even the starting price under the contract is not controlling as a minimum lawful rate.

We further challenge the language of the majority opinion quoted above which states that the applicants, having failed to justify the 17c rate, "No burden of proof rests with interveners or the staff to present negative evidence that the increased rate is unreasonable for until the applicants have presented a *prima facie* case opposing parties have no burden of going forward. Accordingly, the motions to dismiss made by the Public Service Commission of the State of New York, the distribution companies, and by staff counsel must be granted." We feel that when Congress gave the Commission authority to fix lawful rates and supplied it with appropriations with which to employ competent staff, it placed upon the Commission a duty and a re-

sponsibility in the making of a record from which a just and reasonable rate could be determined.

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In proceedings involving independent producer rates before this Commission in every instance of any consequence, the Commission staff has moved to dismiss the proceeding at the conclusion of the applicant's testimony. A number of these rate proceedings are waiting for the decision in this case and presumably will follow the same policies established in this proceeding. In this matter, a very voluminous record has been made by the applicants in an effort to support a price or rate higher than the rate which they were receiving on June 7, 1954. We feel that upon such a factual record a responsibility rests with the Commission to determine a lawful rate. If the record does not contain all of the types of testimony which the Commission would like to have before it, there is no reason why the Commission should not order its staff or the applicant to supply this evidence.

Furthermore, the Commission, by its order, is refusing to permit the applicants to supply any and all testimony of all types which the Commission might indicate would be desirable or necessary in determining a just and reasonable rate. During the oral argument in this proceeding, one of the Commissioners asked the counsel for Union Oil if that company would make a prompt and exhaustive effort to supply additional testimony of any type, whether it dealt with a cost rate base, financial need as an incentive for further development, or otherwise, if the Commission would reopen the case for that purpose. The counsel for applicant stated unequivocally that his company would make an honest effort to promptly supply all facts and evidence in a reopened proceeding, should the Commission indicate the type or nature of the evidence which should be in the record. Like-

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wise, the attorney for Louisiana Land and Exploration Company gave the same answer to this question. We believe that the least the Commission could have done in the interest of fairness and justness to the applicants and the public interest would have been to order the reopening of the proceeding with directions to place in the record any and all phases of testimony which the Commission considered important in determining a just and reasonable rate. It is conceivable that this rate could be lower, higher, or the same as the June 7, 1954, rate.

It must be borne in mind that as of the time this case was submitted for the Commission's decision no court of last resort had enunciated the bases for the determination of a *prima facie* case to support an independent producer's rate. This Commission has never and does not now give such essential information, nor has the Commission ever stated that a cost-of-service rate base was either necessary or important to such a proceeding.

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There is much concern about the lack of progress by the Commission in connection with a determination of just and reasonable rates for independent producers. Certainly a policy of sustaining motions to dismiss these rate proceedings will not improve the situation. The only real and lasting progress which may and should be made in this connection is by the making of records under Section 4 of the Natural Gas Act from which the Commission can determine lawful rates. We also feel that the Commission is under a duty and obligation to the industry to express for the first time its policy with reference to the nature of testimony upon which a lawful rate can be fixed. The majority opinion states that the general testimony given by expert witnesses that the increased rates are needed as a financial incentive for continued production is completely lacking as proof that

the increased rates are just and reasonable. This opinion says much about the necessity for proof of financial need and necessity. It does not make its position clear as to whether or not this proof should be based upon the individual company's financial need or upon an area need of a price as an incentive for continued production. After reading the majority opinion, those representing independent producers will remain completely in the dark as to the type and extent of testimony which the Commission considers necessary in order for it to receive consideration upon its merits in an independent producer rate proceeding.

We feel that as an administrative agency administering an Act of Congress, we should search for and at least cooperate with every effort to accomplish the express purpose laid down by Congress in connection with a determination of lawful rates. We do not believe that technical rules of courts with reference to motions to dismiss should or can be applied by our agency. We feel that an extensive factual record made over a period of several months and many days of hearings is entitled to consideration on its merits. We further feel that a technical approach designed to dismiss these rate cases and avoid the responsibility placed upon the Commission by the Natural Gas Act is adverse to the public interest. The effect of such a policy will be to freeze independent producer rates as of June 7, 1954, and we are convinced that nothing could be more harmful in the long run to the consuming public than the adoption of such a policy. Not only will the policy curtail production, but the Commission, which accepted June 7, 1954 rates out of sheer necessity, has not, as in this case, ever determined the justness and reasonableness of those initial or June 7th rates, and does not do so now. It could be that June 7th rates are too high.

By invoking the constitutional question of protecting the producers against confiscatory rates, we can't help but feel that this is an

unnecessary effort to justify a purely utility type rate base approach to gas sold by independent producers. We cannot agree that the legal conclusions inferred or drawn from this position are valid.

Commissioner Digby takes the further position that the increased prices effective November 1, 1954, were fixed, periodic and definite prices, becoming effective on a fixed date, in contracts entered into prior to June 7, 1954, and are not in reality increases in the rates but actually constitute as much a part of the original initial rate as the price which was being paid on June 7, 1954. He feels that this position is supported not only for the reasons expressed by him in his dissent to Order No. 174-B but also by the later action of the United States Supreme Court in the United Gas-Mobile decision.

We, therefore, reach the conclusion that the record in these proceedings should be reopened to complete a record from which the Commission should make a determination on the merits of that record as to a lawful rate.

FREDERICK STUECK
SEABORN L. DIGBY

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(9593)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matters of	
Sun Oil Company	Docket No. G-8288
E. J. Hudson, *et al.*	Docket No. G-4335
Maracaibo Oil Exploration Corporation	Docket No. G-6279
Sohio Petroleum Company	Docket No. G-8488

ORDER DENYING APPLICATIONS FOR REHEARING AND PETITIONS TO REOPEN THE RECORD.

(Issued April 5, 1957)

Applications for rehearing of the Commission's order issued in these proceedings on February 6, 1957, were filed by Sun Oil Company (Sun) on March 6, 1957, by Sohio Petroleum Company (Sohio), on March 7, 1957, and by E. J. Hudson, *et al.* (Hudson) and Maracaibo Oil Exploration Corporation (Maracaibo), jointly, on March 8, 1957. The order of February 6, 1957, affirmed the initial decision of the presiding examiner granting a motion to dismiss the rate increase proceedings of the applicants. It also disallowed the increased rates and charges, ordered refunds, and denied a joint motion for oral argument.[1] The effect of our order was to deny increases from 9.797 cents per Mcf to 17 cents per Mcf in the rates for the sale of natural

[1] The joint request for oral argument of Hudson and Maracaibo, although not specifically mentioned in the order of February 6, 1957, which denied oral argument in these consolidated proceedings, must be deemed denied by the Commission action taken therein.

gas by Sun, Sohio, Hudson and Maracaibo to Transcontinental Gas Pipe Line Corporation.[2]

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Petitions requesting reopening of the record to permit the presentation of additional evidence were filed by Sohio on January 29, 1957, and jointly by Hudson and Maracaibo on February 4, 1957. Answers in opposition to the petitions were filed by The Brooklyn Union Gas Company, Long Island Lighting Company, The United Gas Improvement Company, and the Public Service Commission of the State of New York.

In the applications for rehearing all applicants renew their requests that the Commission reopen the record in these proceedings. They contend that the Commission should have specified, at any of several points in the proceedings, that rate-base and cost-of-service evidence would be considered an essential element of proof of reasonableness of their increased rates. They argue that they were unaware until issuance of our opinion No. 300, *In the Matters of Union Oil Company of California, et al.*, docket Nos. G-4331, *et al.*, that they should present rate-base and cost-of-service evidence at least as a point of departure in sustaining their burden of proof of reasonableness of the increased rates.

Clearly, the applicants were on notice from the outset of these proceedings that the reasonableness of their increased rates was in question. There is no requirement

[2] By order issued in these proceedings on March 14, 1957, we stayed the effectiveness of our February 6, 1957, order pending action taken upon the applications for rehearing. In our stay order we also provided that if the applications for rehearing should be denied, the stay should continue in effect for a further period of 60 days from the date of issuance of the order denying rehearing. We further provided that if judicial review should be sought and a stay requested from the court, our stay should continue in effect until the court should take action upon the request for stay before it.

that the Commission must detail all elements of proof in giving reasons for suspensions or notice of hearing under Section 4 (e). The Act imposes an affirmative duty upon natural-gas companies to charge and file only reasonable rates and natural-gas companies must take the initiative to assure the continuing reasonableness of their rates. *Cf. Pennsylvania Water & Power Company* v. *Consolidated Gas, El. Light & Power Company*, 184 F. 2d 552, 567 (CA4, 1950), *certiorari denied*, 350 U. S. 906. In filing a change in rate, a natural-gas company, as proponent of the change, must know the elements upon which it relies as justification for the change. The applicants presented what evidence they thought supported the increase from 9.797 cents per Mcf to 17 cents per Mcf. Upon a motion to dismiss, we indicated by order issued October 24, 1955, that the applicants had failed to sustain their burden of proof and unmistakably indicated that the type of evidence they had presented was insufficient to sustain that burden, but we remanded the proceedings to the presiding examiner to give the applicants a second chance to prove the reasonableness of their increased rates. We also unmistakably indicated in that order that protection of the interests of consumers would not permit further extensions of the hearings. Evidence presented upon remand of the proceedings did not cure the initial record deficiencies.

From the testimony presented by the applicants it is obvious that they were fully aware that rate-base and cost-of-service evidence might be held essential. Through opinion testimony they suggested that regulation of rates of independent producers is not feasible under any cost method. Having failed, as a matter of law, to sustain their burden of proof, they cannot avoid that burden or shift it from themselves to others on a claim that

they did not realize what issues were involved in justification of their own rate increase filings. The *City of Detroit* case[3] states the minimum requirements of proof to satisfy the statutory standards of reasonableness of increased rates. These standards are applicable to all natural-gas companies whether they be interstate transmission companies or independent producers.

Notably, in explanation of their failure to present rate-base and cost-of-service evidence when the opportunities were afforded to them, applicants strenuously contend that they were justified in basing their proof upon the field-price theory set forth in our opinion No. 269, *In the Matters of Panhandle Eastern Pipe Line Company, et al.*, docket Nos. G-1116, *et al.*, issued April 15, 1954. Yet now, without receding from that position, each applicant just as strenuously contends that the same case, modified on appeal, is not applicable to the rates of independent producers. We find that it would not be in the public interest or consistent with orderly administration of the Natural Gas Act to delay final determination of these proceedings in order to give the applicants a third chance to sustain their burden of proof.

The applications for rehearing allege other specifications of error which raise essentially the same issues heretofore raised by Sun, Hudson, Maracaibo, and Sohio, and which were fully considered by us in issuing our order of February 6, 1957. We find nothing in the application for rehearing which justifies or requires a disposition of these issues in any manner other than that heretofore made.

The Commission finds:

(1) The applications for rehearing of our order issued on February 6, 1957, in these proceedings, set forth no new

[3] *City of Detroit* v. *F.P.C.*, 230 F. 2d 810 (CADC, 1955), *certiorari denied*, 352 U.S. 829.

facts and no principles of law which either were not fully considered by the Commission when it issued that order or which having now been considered warrant any change in or modification of such order. All contentions and objections not specifically discussed or referred to herein have been considered and found either without basis in law or support in fact, but are not sufficiently material to warrant individual treatment or have been adequately disposed of otherwise.

(2) It is necessary and appropriate in the public interest and in aid of orderly administration of the Natural Gas Act that the petitions to reopen the record in these proceedings filed by Sohio on January 29, 1957, and jointly by Hudson and Maracaibo on February 4, 1957, should be denied.

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The Commission orders:

(A) The applications for rehearing of our order issued on February 6, 1957, in these proceedings, filed by Sun on March 6, 1957, by Sohio on March 7, 1957, and jointly by Hudson and Maracaibo on March 8, 1957, are each hereby denied.

(B) The petitions to reopen the record in these proceedings for the purpose of introducing additional evidence filed by Sohio on January 29, 1957, and jointly by Hudson and Maracaibo on February 4, 1957, are each hereby denied.

By the Commission. Commissioners Digby and Stueck dissenting.

JOSEPH H. GUTRIDE,
Secretary.

* * *

APPENDIX B

Section 4 of the Natural Gas Act

SEC. 4.(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such

notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the sus-

Section 4 of the Natural Gas Act

pension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. §717c]

* * *

Section 19(b) of the Natural Gas Act

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[a] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a

[a] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX C

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1957

No. 16,581

BEL OIL CORPORATION, *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

Before TUTTLE, JONES and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Bel Oil Corporation for a review of an order of the Federal Power Commission issued on December 6, 1956, in Docket No. G-4505, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted to the extent that the Commission is directed to reopen these proceedings to afford petitioner reasonable opportunity to adduce such evidence as it may be advised is relevant to the inquiry whether the proposed rate of 16 cents plus 1 cent state tax is just and reasonable; and in all other respects that said petition be, and it is hereby denied.

April 23, 1958.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1957

No. 16,583

UNION OIL COMPANY OF CALIFORNIA and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

Before TUTTLE, JONES and WISDOM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Union Oil Company of California and The Louisiana Land and Exploration Company for a review of an order of the Federal Power Commission issued on December 6, 1956 in Docket Nos. G-4331 and G-4332, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted to the extent that the Commission is directed to reopen these proceedings to afford petitioners reasonable opportunity to adduce such evidence as they may be advised is relevant to the inquiry whether the proposed rate of 16 cents plus 1 cent state tax is just and reasonable; and in all other respects that said petition be, and it is hereby, denied.

April 23, 1958.

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1957

No. 16,584

Morris Rauch, et al.,

Petitioners,

versus

Federal Power Commission,

Respondent.

Before Tuttle, Jones and Wisdom, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Morris Rauch, and others, for a review of an order of the Federal Power Commission issued on December 6, 1956 in Docket No. G-4334, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted to the extent that the Commission is directed to reopen these proceedings to afford petitioners reasonable opportunity to adduce such evidence as they may be advised is relevant to the inquiry whether the proposed rate of 16 cents plus 1 cent state tax is just and reasonable; and in all other respects that said petition be, and it is hereby, denied.

April 23, 1958.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JUDGMENT

EXTRACT FROM THE MINUTES OF APRIL 23, 1958.

No. 16722.

SUN OIL COMPANY,

v.

FEDERAL POWER COMMISSION.

This cause came on to be heard on the petition of Sun Oil Company for a review of an order of the Federal Power Commission issued on February 6, 1957 in Docket No. G-8288, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is hereby, granted to the extent that the Commission is directed to reopen these proceedings to afford petitioner reasonable opportunity to adduce such evidence as it may be advised is relevant to the inquiry whether the proposed rate of 16 cents plus 1 cent state tax is just and reasonable; and in all other respects that said petition be, and it is hereby, denied.

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AUG 20 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 197 and 201

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC & GAS COMPANY, UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY, *Petitioners*,

v.

BEL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, LOUISIANA LAND AND EXPLORATION COMPANY, MORRIS RAUCH, ET AL., AND SUN OIL COMPANY, *Respondents*.

On Cross-Petition and Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 197 and 201

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC & GAS COMPANY, UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY, *Petitioners,*

v.

BEL OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, LOUISIANA LAND AND EXPLORATION COMPANY, MORRIS RAUCH, ET AL. AND SUN OIL COMPANY, *Respondents.*

On Cross-Petition and Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR UNION OIL COMPANY OF CALIFORNIA AND LOUISIANA LAND AND EXPLORATION COMPANY IN OPPOSITION

OPINION BELOW

The orders of the Federal Power Commission dismissing the proceeding (R. 555-580) and denying petition for rehearing (R. 586-600) are reported at 16 F. P. C. 100 and 16 PUR (3d) 112. The opinion of

the Court of Appeals (Pet. App. 1a-14a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1958 (Pet. App. 86 a). The petition for a writ of certiorari was filed on July 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether independent producers as are respondents, with far-flung domestic operations are required by the holding in the *City of Detroit* decision to invariably submit net investment, rate-base data to the Federal Power Commission in support of the justness and reasonableness of an arm's-length negotiated sale price for a segment of their total natural gas production under pain of disallowance thereof.

2. Whether a fixed, definite and certain contract price for new gas sales freely negotiated at arm's-length prior to June 7, 1954, to be in force on a date thereafter, is a new rate or a change in rate under the terms of § 4 of the Natural Gas Act.[2]

3. Whether the Federal Power Commission could be required under the provisions of the Natural Gas Act to reopen proceedings in view of the denial by it of opportunity for respondents' effort to present cost of service evidence when the Commission had declared such evidence necessary only in its final order of

[1] *City of Detroit* v. *Federal Power Commission*, 203 F. 2d 810 (CADC), certiorari denied, 253 U. S. 829.

[2] 52 Stat. 822 (1938); 15 U. S. C. § 717(c).

dismissal, and which evidence it now confesses is inapplicable and impossible to produce in such circumstances as were then before it.

STATUTE INVOLVED

The applicable portions of the Natural Gas Act are set forth in the Appendices to the Petition at pages 81 a-84 a.

STATEMENT

Respondents are engaged in the business of producing oil and gas in a number of areas throughout the United States.

In 1948, a gas sales contract was negotiated by respondents with Transcontinental Gas Pipeline Corporation, (Transcontinental) (R. 248-249) a natural gas pipeline transmission company for natural gas produced by respondents from five southern Louisiana producing areas. This contract contained the usual and customary provisions in common usage in the industry with respect to first party and third party favored nations clauses and a *bona fide* purchase offer clause (R. 52-55). Its term was twenty years. Deliveries of gas commenced thereunder in 1951.

In 1952, Transcontinental became aware that its future gas supply was in jeopardy and that the contract price for its then present supply was subject to drastic increase (R. 35-36). Other pipeline purchasers were entering the area with offers for natural gas purchases in excess of the contract price contained in the then existing contract with respondents (R. 36-37). The higher prices being offered, and future price escalations under the third party favored nations contractual clauses would place the future cost of gas to Transcontinental beyond its power to control (R. 38-39).

Likewise, a dispute arose between the parties as to the effect of an unrelated sale and purchase by others upon the escalated price to be paid respondents by Transcontinental (R. 40 *et seq.*). Arbitration of this dispute resulted in a settlement between the parties under which an interim price of 8.79¢ per Mcf plus 1¢ per Mcf tax reimbursement was to be effective from July 1, 1952 until November 1, 1954. In addition, the third party favored nations clause in the 1948 contract was to be held in abeyance (R. 41).

Thereafter, arm's-length negotiations were conducted by Transcontinental and respondents which resulted in the execution of five superseding contracts on November 17, 1953 (R. 43). In return for a price of 16¢ per Mcf plus 1¢ for tax reimbursement, respondents, in terms of Transcontinental, gave "very valuable and basic consideration" under these 1953 renegotiated agreements (R. 46-49).

According to the purchaser, the considerations granted by respondents in return for the 16¢ price in the negotiation of the new 1953 agreements have benefited its position immeasurably. Thus, the new contracts would grant, among many other benefits, the following rights (R. 42, *et seq.*):

1. A new extended contract term of 20 years.

2. The deletion of the previously effective third party favored nations clauses.

3. Restriction of the area of influence of the first party favored nations clause to exclude all areas east of the Mississippi River.

4. Dedication under the new contracts of additional gas reserves in the order of 383 billion cubic feet.

5. Increase in maximum daily allowable deliveries to 125,000,000 cubic feet.

6. Fixed and certain prices throughout the 20 year contractual term far below the price of other comparable gas supplies then and now available.

7. At the buyer's option, to purchase under the same fixed price all additional gas supplies developed in the producing areas subject to the contracts.

8. Dedication of approximately 100 billion cubic feet to respondents' performance under the new contracts.

In short, Transcontinental felt that it "had made a good deal" (R. 36-49).

The 1953 contracts were negotiated upon the basic reliance by respondents of historically consistent repudiation by the Federal Power Commission of its jurisdiction under the Natural Gas Act over producers and gatherers of natural gas. *Columbia Fuel Corporation*, 2 FPC 200; *Regulation No.* 163, 17 F. R. 7385; *Regulation* No. 144, 13 F. R. 6371.

On June 7, 1954, this Honorable Court rendered its decision in the *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

On August 6, 1954, the Federal Power Commission without notice or hearing issued its Order No. 174-A with dissent. The order required the filing of initial rate schedules and applications for certificates of public convenience (R. 327-346).

Under protest and with full reservation of rights, respondents submitted in compliance thereto on September 30, 1954. The filings were made by them to avoid the criminal penalties imposed for violations

thereof. Included in these filings were all contracts governing the sales to Transcontinental (R. 389-394); that is, the original May 4, 1948 contract (R. 248-284); the September 6, 1952 amendment thereto resulting from the arbitration of the interim 8.797150¢ price per Mcf to October 31, 1954 (R. 284-194); and the November 17, 1953 agreement to be effective November 1, 1954 as cited before (R. 295-327).

History of Proceedings: On October 29, 1954, the Federal Power Commission issued orders suspending the use of the November 13, 1953 contract terms, as theretofore negotiated to become effective on November 1, 1954 (R. 389-394). The Federal Power Commission on December 7, 1954 denied (R. 411-415) respondents' request for reconsideration and vacation of the suspension orders (R. 394-410). This action was sustained, *Union Oil Company of California and Louisiana Land and Exploration Company* v. *F.P.C.*, 236 F. 2d 816, *cert.* denied 352 U. S. 969, on the general grounds that the orders were then not reviewable.

Hearings on the matters before the Federal Power Commission were first conducted in September 21-23, 1955 in which respondents by uncontroverted evidence established a mass of substantive detail on the justness and reasonableness including the facts heretofore recited. Petitioners thereafter made motion to dismiss on the general ground that respondents had not sustained the burden of proof under Section 4(e) of the Act, to show that the prices in the 1953 superseding contracts were just and reasonable. On October 24, 1955, the Federal Power Commission issued its order which deferred action on the motion and referred the proceedings to its Examiner (R. 468-477).

Pursuant to Federal Power Commission directive, hearings were resumed before it on November 28,

1955 and respondents exhaustively established the pertinent evidence applicable to, and in justification of, its 1953 negotiated contract price. This evidence, again uncontroverted, established among many others, the following facts:

> The minimum price of 16¢ per Mcf was required for pipeline purchasers to then secure gas suppliers because the competitively established level in the producing areas in question ranged from 16¢ to 20¢ (R. 122-126). Such gas reserves several years later, in 1955 were readily sold at 20¢ per Mcf (R, 119).
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> Further, the contract prices of 16¢ were considered fair and reasonable by the parties. It was a price that resulted in considerably lower end-use customer costs in the terminal markets than were rates of Transcontinental's pipeline competitor (R. 109-111). Petitioners occupied no dominant position in the natural gas producing industry either in Louisiana; in the nation as a whole; or in relation to Transcontinental's total gas purchases (R. 92-97, Exhibits 4, 5, 6, R. 149-153). The 1953 renegotiated contract price of 16¢ per Mcf is less than the price of competing fuels, either coal or oil at the sites of production of such fuels and the places of use thereof (R. 128-129).
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> On a national basis, additions to domestic natural gas reserves have not maintained pace with the accelerated rate of gas consumption. The rates of proved reserves to net annual production has declined from 32.5 years in 1946 to 22.4 years in 1954 (Exhibits 18 and 19, R. 158, 159, R. 104-105, R. 113-118, Exhibit 31, R. 170-195). Less gas and oil reserve is found per unit of exploratory hole drilled, the costs of which in turn are increasing constantly as deeper drilling is conducted in more inaccessible areas (R. 115-120).

> The incentive for exploration and development of new gas reserves is directly geared to the prices which the producers can expect to market the proceeds which are on statistical basis infrequently encountered (R. 106-107, 114). A reasonable level of compensation is necessarily required, as well as removal of the uncertainties of the present state of the law upon which prices will be determined in the administrative forum, in order to stabilize the industry and permit orderly and timely development of natural gas reserves (Tr. 215-216).

Petitioners renewed motion to dismiss on November 30, 1956 which was referred to on December 2, 1956. The Federal Power Commission by order issued January 23, 1956 postponed its action on the motion, and pursuant to notice of resumption, the proceedings were reconvened for hearing on March 14, 1956. Respondents having concluded the direct cases in chief, rested. No other party introduced evidence and the hearing was concluded. Motions to dismiss were renewed by petitioners.

The initial decision issued on May 2, 1956 (R. 486-543). Intervenor's motions to dismiss were therein sustained solely upon the absence of evidence of costs of service to support the 16 cent price per Mcf contained in the 1953 superseding contracts. Respondents' motion to dismiss on jurisdictional grounds was denied.

After exceptions filed and argument had, the order of the Federal Power Commission accompanying its divided opinion No. 300[3] (R. 554-580) issued December 6, 1956. *This order also imposed upon petitioners each and every obligation and condition of the new and superseding contracts of November 17, 1953, but*

[3] *Union Oil Company of California* (Opinion 300), 16 F. P. C. 100.

denied to them the only consideration therefor flowing to them, namely, the increased price for which they had contracted to furnish the new services and impressive benefits to Transcontinental.

Opinion No. 300 announced for the first time that the *City of Detroit* criteria *supra* p. 2 fn. 1 obtained in producer proceedings. (Pet. App. 10a, 11a)

After petitions for rehearing filed on January 4, 1957 (R. 585-586) and denied by Federal Power Commission on January 31, 1957 (R. 586-600) and February 8, 1957 (R. 601-602), petition for review was filed by respondents in the court below on March 27, 1957, under Section 19 (b) of the Natural Gas Act and Section 10 of the Administrative Procedure Act for relief cited before; specifically that among other things, Federal Power Commission be directed to reopen the proceedings with leave to respondents to adduce additional evidence deemed necessary only then by Federal Power Commission to support the justness and reasonableness of respondents' 1953 contract prices of 16c per Mcf plus 1c state tax reimbursement.

ARGUMENT

"Statement of the Case" in the petition attempts in an unfortunate manner to cast the erroneous impression that respondents through deliberate design and determined intent seek the frustration of the regulatory function of the Federal Power Commission (Commission) to which jurisdiction these petitioners, as complainants, are in no manner subject, nor through which regulatory function these same petitioners incur no liability.

In furtherance of this objective, petitioners infer that respondents with all obstinance have persistently

declined in a proceeding before the Commission, convened presumably for the express purpose therefor, to submit evidence of financial requirements in support of those freely negotiated contract 16 cent prices agreed upon with Transcontinental, all deliberately done, supposedly, with the knowledge aforehand that such type of evidence was and is even now essentially requisite to compliance with the law of the matter, however unsettled.

Petitioners grievously err to the prejudice of respondents in this presentation in both matters of law and matters of fact.

1. The 16 cent price per Mcf plus one cent state tax reimbursement was not the result, as petitioners state, (Pet. 3)[4] of the automatic escalation clauses in respondents' contracts with Transcontinental Gas Pipe Line Company (Transco). The presiding examiner of the Federal Power Commission in the intermediate decision leading to Opinion No. 300, so established (R. 500):

> It should immediately be noted that this theory is, of course, not in any way applicable to the instant *Union Oil* increase in Docket Nos. G-4331 and G-4332, *since the proposed now 16¢ rate there came into being in an entirely new contract, having an effective date of November 1, 1954*, and not as a result of the operation of any provision in the original contract of May 4, 1948 (Italics provided).

This point of the Examiner's decision was specifically affirmed by the Commission (R. 562) yet notwithstanding it was suspended as a change in rate (R. 398-391).

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[4] "Pet. " refers to petitioners' cross-petition and petition.

2. Petitioners err in the conclusion that respondents failed after "three rounds of hearings to justify the higher rate" (Pet. 4). This conclusion is diametrically opposed to the evidence of record in that the Commission and its examiner recognized that respondents initially presented extensive "documentary evidence and oral testimony" (R. 471) and thereafter "voluminous additional evidence consisting of some 33 new exhibits, together with additional testimony of six witnesses" (R. 479). Further, the record demonstrates that the proceeding was divided into two phases (R. 502, 517, 550) not "three rounds"[5] with respondents making every conceivable effort throughout to pursue to satisfaction the elusive character of evidence which could or would be persuasive in the circumstances of this, the first series of cases involving the rates of independent producers before the Commission (R. 475). It is noteworthy, too, that at the time of hearing this effort was expended in the ambiguous background recognized by all that the Commission had not then or even to this day developed standards which should be applied in fixing producer rates. (R. 76, Pet. 8).[6]

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[5] The "third round" to which petitioners refer was a resumption of the proceeding to permit petitioners to cross-examine and present evidence in rebuttal, such petitioners having been unable or incapable of so doing at times previous thereto (R. 495-96).

[6] In FPC Opinion No. 310, *Pan American Petroleum Corp., et al.*, issued as recently as April 4, 1958, 19 FPC 463, and cited by the Court below (Pet. App. 10a) the Commission stated:

> . . . In fact . . . we have not determined in any case the extent to which such evidence (rate base evidence or evidence of revenue requirements) should be required of the independent producers (Parenthesis added)

3. Petitioners err in raising the implication that respondents wilfully declined to submit cost and financial data as ordained by the Commission, it being recklessly asserted (Pet. 4) that:

> . . . The producers understood what was being asked of them, as the Court below found . . . The producers, nevertheless, in each of the proceedings, withheld such data with full knowledge that the need for it was an issue . . . .

The record clearly discloses that petitioners were either unwilling or disinclined to submit in rebuttal the type of evidence which they themselves extensively advocated (R. 18, 84, 496). Petitioners' premise repeatedly has been rejected by the Commission and its Examiner when vainly tried before to dictate the exclusive character of evidence upon which it, the Commission must have before it to fix producer rates (R. 74-76, 463, 475, 547). Petitioners thus have eloinged the issue with some effect, to the end that black would now appear indeed to be white. This presumption advanced in error was likewise summarily rejected in similar manner to that above by the Court below (Pet. App. 11a). It is clear, in the situation, that petitioners cannot seek with justification before this Court or elsewhere to cloak their interpretations of the requisite evidence to be offered at the expense and effort of respondents with the same dignity and authority as that which would accompany Commission and Court pronouncement and mandate.

4. Petitioners err in the argument that the basis of administrative delay in adjudication by the Commission must be laid at the door of producers (Pet. 8).

The producers as a class which are thus subjected to this indictment obviously comprise the one group

of the industry most prejudiced by this delay (R. 78-82). Petitioners here, as interveners below, have participated at length in these and many other similar proceedings to the great protraction thereof. While these petitioners before this Court denounce the affirmative evidence advanced in earnest effort by respondents all done with sincere conviction of its worth, substance and merit in these particular premises, these same petitioners have volunteered no showing in support of their cause which would be beneficial to the early disposition of the issues herein raised, despite the call to do so by respondents, and full opportunity having been afforded therefor (R. 79, 83, 84, 495, 496).

Further, petitioners contrary to implication in argument (Pet. 8), assume no financial risk, nor do they stand chance of monetary loss by protraction of this interim of extensive delay. Instead, such petitioners are eligible of and to themselves exclusively of economic windfalls in the form of interest on such funds as may be ordered eventually refundable by respondents to petitioners and which in turn would not be susceptible to refund by petitioners to the "millions of consumers" whose interests they espouse here (Pet. 8, 9).

It is clear that petitioners can speak for their interests alone and do so here in the face of the absence of the two legislatively established agencies that as parties to this proceeding are the ones exclusively charged with the protection of the public interest. These are the Federal Power Commission and the Public Service Commission of the State of New York (R. 488). Neither one of the foregoing bodies have seen fit to seek review of the decision of the court below to which the petition here is directed.

5. Petitioners err in the assertion that court decision has established the proposition that financial data is indispensible to a rate case (Pet. 8).

Refutation of this baseless conclusion is inherent even in the two cases cited by petitioners asserted in support thereof. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581. These and many other cases of such long standing have so firmly established to the contrary that no extensive discussion in opposition is required.

The law of the matter has been determined by this Court to be that it is within the prerogative of the Commission in the ambit of its legislatively delegated authority to select a rate formula free from judicial interference so long as rates are not demonstrated by the evidence to be either confiscatory at one extreme of the scale or unreasonably high on the other. *Cf. Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U. S. 635; *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575. The Commission has consistently adhered to this established precept in this and other proceedings before it (R. 539, 547).[7]

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[7] In FPC Opinion No. 310, *Pan American*, *supra*, f.n. 6 the Commission stated:

"'. . . In the *City of Detroit* case (R. 571) as is patent from reading the opinion the Court was primarily concerned with the protection of the consumer of gas. It is clear here that to disallow this increased rate because of rigid adherance to a cost policy would '. . . (be) . . . to the detriment of the consumers elsewhere.' To approve this rate which we think fully supported, is a type of '*pragmatic* adjustment' which we are permitted to make. *F. P. C.* v. *Natural Gas Pipeline Co.*, *supra*, p. 586. *Cf. Market Street Railway Co.* v. *Comm'n.*, 324 U. S. 548, 563-569." (Parenthesis added.)

6. Petitioners err in the declaratory accusation that respondents "have sought delay at every opportunity hoping for legislative relief from the rate making consequences to them of *Phillips*" (Pet. 8, 9).

In extension of disclosure of the same patent error assigned petitioners under No. 4, *supra,* the record reflects four requests of respondents for postponement of these proceedings, each made and granted for good, necessary and sufficient causes there shown (R. 444, 450, 457, 465, Pet. App. 19(a), fn. 5). At the outset, it is to be observed that each of these four requests were granted absent any protest of record by petitioners, for the basic reason that delay of this matter then and now can be of else than benefit to these same petitioners, *supra,* p. 13.

The first such request of February 14, 1955, in the form of a motion for continuance and reassignment of hearing date as then set for March 8, 1955, was essential due to pendency of petition to review taken to Commission orders Nos. 174-A and 174-B and the suspension orders of October 29 and December 24, 1954. Adjudication of the validity of these orders was fundamental to the determination in the first instance of jurisdiction of the Commission in the premises (R. 444).

The second such request of March 2, 1955 to postpone the proceeding before the Commission as then reset for March 21, 1955 was required and grounded on the same basis as the first above (R. 450).

The third such request of May 24, 1955 to postpone the proceedings as then reset for June 20, 1955, was similarly based upon the then still pending appellate review. Additionally it was appropriate in view of the introduction of legislation before the Congress of

the United States, to which the Commission had reported favorably. This legislation if enacted would have rendered moot these proceedings before the Commission (R. 457, 458).

The fourth such request of June 24, 1955, in addition to being required by all of the foregoing, was also required due to the inability of respondents to proceed with the preparation of evidence, of then uncertain and nebulous character, and which evidence was to have been the subject of future ascertainment in conference between all parties, including petitioners, to the proceedings (R. 464). This effort toward conference of parties was exerted in the sincere desire that there be established some standards, principle or method by which the Commission's administrative burden could be lessened to the benefit of all parties to this proceeding, through the expeditious determination of the just and reasonable character of the contract prices here in question.

7. Petitioners err in their position that the Court below was not empowered in these particular circumstances to direct the Commission to reopen the proceedings for the purposes stated (Pet. 9-11).

As a general matter of law it is unquestioned that the discretion to reopen administrative proceedings lies with the administrative agency absent extraordinary circumstances or abuse of exercised discretion.

However, the authorities cited (Pet. 9-11) in the petition apply to completely dissimilar situations than the particular matters here and fail utterly to lend support to the argument petitioners advance.[8] To be

[8] For example, *Interstate Commerce Commission, et al. v. City of Jersey City, et al.*, 322 U. S. 503, wherein that Commission ad-

more proximate in argument it is incumbent upon petitioners to first dislodge the following several firmly established propositions which are so pertinent and controlling in the circumstances of this case.

One, that conclusions of law by the Commission while entitled to consideration by the courts do not have the same finality as findings of fact, *Levinson* v. *Spector Motor Co.*, 330 U. S. 649. *Two*, as stated in *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 ". . . if the action (by the Commission) is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law . . ." *Three*, ". . . the administrative process will best be vindicated by clarity in its exercise . . ." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197. *Four*, ". . . where as here, an applicant relying on good faith upon previously determined standards, as expressed in previous written statements or conclusions of agencies, acts in accordance with such standards, such applicant should not be precluded from an opportunity to meet the revised standards if, without notice, the agency determines upon new or more sensitive standards. That is all the more true where, as here, the applicant has stated in writing and unequivocally that it is in a position to meet such revised

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ministering an entirely different statute than the Natural Gas Act was sustained in its order reopening a limited portion rather than the entire proceeding; *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563 also involving the administration of an entirely dissimilar statute than is the Natural Gas Act, ruled that the order of the Board of the court to adduce additional evidence was ineffective when the matter to which the additional evidence would pertain would not be in any instance within the purview of the court's jurisdiction to thereafter pass upon.

standards by competent evidence, if allowed the opportunity to do so. . . ." *E. Brooke Matlack, Inc.* v. *United States,* 119 F. Supp. 617, 622.

The court below in its decision [9] in effect did nothing more than to determine as a matter of law that the evidence of record was not sufficient for it to pass upon the many vital issues of law which were before it on respondents' (petitioners below) petition for review of the several Commission orders (Pet. App. 13 a). The decision is not final. It simply provides for the receipt of evidence which petitioners themselves have repeatedly demanded (Pet. 8) all in order to attain an objective that their spokesman has stated of record that he ". . . does not oppose but in fact supports. . . ." (R. 17).

The court below did not disturb the findings of fact of the Commission contained in opinion No. 300, *Union Oil Company of California, et al.,* 16 F. P. C. 100 (Pet. App. 17a-41a). However, what it did say was that the finding of law [10] of the Commission in that opinion was not then being affirmed (Pet. 10 a). The court indicated that this finding would be passed upon with

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[9] Respondents' position should not be construed to be in support of substantive matter contained in the decision below, but respondents urge with utmost conviction that the law establishes the right, duty and power of the lower court to direct the reopening of these proceedings in the particular circumstances of the case.

[10] The entire thrust of the Commission's opinion No. 300 was hinged upon one conclusion of law (Pet. App. 6 a, 7 a, 32 a, 46 a, 47 a) to wit:

". . . We think that the recent decision of the Court of Appeals for the District of Columbia Circuit in *City of Detroit* v. *Federal Power Commission,* 230 F. 2d 810 (C. A. D. C. 1956), *certiorari* denied, 352 U. S. 829 is controlling here. . . ."

other issues upon *completion* of the record before the Commission (Pet. App. 13 a). The record manifestly was determined in its present state to be incomplete for adjudication of this question. This was within the proper scope of judicial review. The court did not seek to enlarge the statutory scope of proper judicial review. Quite to the contrary, it recognized that the Commission is the trier of fact, but to enable the court to pass upon questions of law raised on those facts, obviously necessary evidence, must first be adduced after opportunity afforded.

* * * *

Further, the court below perceived that the exercise of the administrative process here is by no means clear (Pet. App. 10 a, 11 a). In such obscurity the administrative process cannot be vindicated, *supra,* p. 17. The chronological sequence of events of this administrative process in this particular instance is illustrative.

1. The Commission on December 1, 1955 terminated the proceedings in its Docket No. R-142 and declined therein to establish the rules for which purpose the proceeding had been convened. These rules would have declared the character of evidence deemed necessary by the Commission in the determination of just and reasonable rates of any independent producer subject to its jurisdiction under the Natural Gas Act (R. 462, 463).

2. The proceedings before the Commission which were convened to pass upon the just and reasonable nature of respondents' contract prices here in issue, were concluded on March 14, 1956 (R. 560).

3. The trial examiner's decision in respondents' rate proceeding issued on May 2, 1956 and espoused

the applicability of the *City of Detroit* doctrine as governing in the matters (R. 535).

4. At the very same time as this intermediate decision issued, May, 1956, the Commission was seeking before this Court to overthrow the *City of Detroit* doctrine.[11]

5. The intermediate decision in these matters was adopted by the Commission in its opinion No. 300 issued December 6, 1956, *supra* p. 1, approximately eight months thereafter, at which time respondents first became aware of the Commission's standard of requisite cost evidence in support of their contract prices (Pet. App. 10 a, 11 a).

6. The Commission by order issued January 31, 1957 denied respondents' request for leave to present

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[11] The Commission, in its petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, *Federal Power Commission, Petitioner* v. *City of Detroit, Michigan, and County of Wayne, Michigan*, No. 113, dated May, 1956, stated in part (pp. 11, 12):

> ". . . If the lower court means to require adherance by the Commission to the rate-base formula 'as a basis of comparison' or 'as a point of departure' the court necessarily is running *contra* to the prior decisions of this Court. Flexibility in the selection of formula and freedom to select the formula best calculated to serve the public interest are the essence of the rate making function and indeed this Court has been zealous to protect regulatory agencies in this basic prerogative. . . . In other words, the court did not consider the field price method on its own intrinsic worth but related it to another formula. We respectfully suggest that if the field price formula is proper—and its suitability was accepted by the lower court—it is proper on its own merits and does not become suspect because it produces larger amounts than would be produced by some other method. . . ."

evidence of their financial requirements and on appropriate rate base and cost of service applicable to their sales to Transcontinental (R. 586, 587).

* * * *

Finally, it is clear that the resolution of the vital legal issues fundamental in the petition to review in the lower court is soundly within the jurisdictional scope of that court to review under the statute. The Natural Gas Act, § 19(b) (Pet. App. 83 a, 84 a) reads clearly and unequivocally in this respect. Here is no play of discretion within the exclusive control of the Commission:

> ". . . If any party shall apply to the court for leave to adduce additional evidence, and shall show to the *satisfaction of the court* that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, *the court may order* such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms as to the court may seem proper . . ." (Italics supplied)

The court below is satisfied in this respect.

CONCLUSION

For these reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I, George D. Horning, Jr., a member of the Bar of this Court and one of the attorneys for respondent herein, Union Oil Company of California, do hereby certify that pursuant to Rule 33 of this Court on the 20th day of August, 1958 I served a copy of the foregoing and annexed Brief in Opposition to the Petition for Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit upon counsel of record for petitioners, namely: David K. Kadane, Bertram D. Moll, at 250 Old County Road, Mineola, New York, attorneys for petitioner Long Island Lighting Company; J. David Mann, Jr., John E. Holtzinger, Jr., Morgan, Lewis & Bockius, 1230 Pennsylvania Building, Washington 4, D. C., attorneys for petitioner, United Gas Improvement Company; J. Harry Mulhern, 80 Park Place, Newark, New Jersey, William R. Duff, 1323 Wyatt Building, Washington 5, D. C., attorneys for petitioner, Public Service Electric & Gas Company; Vincent P. McDevitt and Samuel G. Miller, 1000 Chestnut Street, Philadelphia 5, Pennsylvania, attorneys for petitioner, Philadelphia Electric Company, by depositing the same in the United States mail properly addressed to each of the above-named persons at the respective post office addresses shown, with first class postage prepaid to those addresses shown to be within the District of Columbia, and air mail postage prepaid to those addresses shown to be elsewhere.

/s/ GEORGE D. HORNING, JR.